

121avilc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 SECURITIES AND EXCHANGE
4 COMMISSION,

Plaintiff,

v.

05 CV 5231

5 AMERINDO INVESTMENT ADVISORS,
6 INC.,

Defendant.

-----x

7 UNITED STATES OF AMERICA,
8 Plaintiff,

v.

05 CR 621

9 ALBERTO VILAR AND GARY TANAKA,
10 Defendant

-----x

11 New York, N.Y.

12 January 10, 2012
13 4:45 p.m.

14 Before:

15 HON. LAURA TAYLOR SWAIN,

16 District Judge

17 APPEARANCES

18 US DEPARTMENT OF JUSTICE

Attorneys for Plaintiff

19 BY: SHARON COHEN LEVIN

BENJAMIN A. NAFTALIS (CR)

20 SECURITIES AND EXCHANGE COMMISSION

21 Attorneys for Plaintiff Amerindo

22 BY: NEAL JACOBSON

MARK D. SALZBERG

23 GARY TANAKA, Pro Se Defendant

24 VIVIAN SHEVITZ

JANE SIMKIN SMITH, of Counsel

25 Attorneys for Defendant Vilar (CR)

121avilc

1 DAVID C. BURGER
Attorney for Vilar, (CV)

3 VICTORIA B. EIGER
Attorney for Defendants, Tanaka (CR)

5 JULIAN W. FRIEDMAN
Attorney for Investors Marcus, Heitkoenig, Salvitti

7 PATRICK W. BEGOS
Attorney for Investor, Mayer

9 THOMAS J. HALL
Attorney for Investor, Sayko

121avilc

1 (In open court; defendant Tanaka present via telephone
2 conference call)

3 JUDGE SWAIN: Good afternoon, please be seated.

4 This is a combined hearing in the United States
5 against Vilar and Tanaka, and SEC v. Amerindo.

6 I'm Judge Swain, the judge presiding over the civil
7 case, and Judge Sullivan, who resides over the criminal case is
8 here as well. And, first, I would like to take appearances
9 from the people who are at the table.

10 Actually, I think I'll start with Mr. Tanaka who is on
11 the phone so that we can confirm that we can hear him and he
12 hear us. And Mr. Tanaka, we do have a court reporter here in
13 the courtroom, so we should be able to overcome inaudibility
14 issues. If she can't hear you, we'll let you know and ask you
15 to repeat something.

16 So, Mr. Tanaka, would you introduce yourself first?

17 DEFENDANT TANAKA: Gary Tanaka.

18 JUDGE SWAIN: Good afternoon, Mr. Tanaka.

19 DEFENDANT TANAKA: Good afternoon, your Honor.

20 JUDGE SWAIN: So let's start with the front table.

21 Ms. Levin.

22 MS. LEVIN: Yeah, good morning, your Honors. I'm
23 Sharon Levin, I'm here for the government. I am handling the
24 asset forfeiture matters. Here with me is Ben Naftalis and he
25 is the prosecutor on the criminal case.

121lavilc

1 MR. JACOBSON: Neal Jacobson on behalf of The
2 Securities and Exchange Commission, and my colleague, Mark
3 Salzberg.

4 MS. SHEVITZ: Vivian Shevitz. And we represent
5 Alberto Vilar in the criminal matter and on the appeal.

6 MR. BURGER: Good afternoon, David Burger,
7 representing Mr. Vilar in the SEC action, your Honor.

8 MS. EIGER: Victoria Eiger. We represent Mr. Tanaka
9 on the criminal appeal.

10 MR. FRIEDMAN: Julian Friedman. I represent three of
11 the investors in ATGF, Paul Marcus, Alfred Heitkoenig and, as
12 of this morning, Dr. Ronald Salvitti. And I'm here by virtue
13 of having written a letter to the Court and the Court blessing
14 my participation in this conference.

15 JUDGE SWAIN: Yes. And there are other
16 representatives of investors or victims here as well. And to
17 the extent we need people to speak, we'll ask you to identify
18 yourselves at that time. I do have the cards on the appearance
19 sheet.

20 But at this point, I'm going to turn matters over in
21 the first instance to Judge Sullivan to talk about the status
22 of the forfeiture progressions.

23 JUDGE SULLIVAN: Okay, thank you very much, Judge
24 Swain.

25 Good afternoon to all of you, many of whom I'm meeting

121avilc

1 for the first time.

2 Back at the sentencing -- Mr. Naftalis, you were
3 there, I think you might be the only person at these tables
4 that was there -- there was a discussion about forfeiture. And
5 Mr. Colton on behalf of Mr. Tanaka said that there was no
6 objection by Mr. Tanaka to take all of the value that was in
7 those accounts, different accounts that have been discussed,
8 and have them forfeited to the government based on the
9 government's representation that they would be used to repay
10 investors. So there seemed to be a consensus at that point
11 that a preliminary order of forfeiture would be appropriate.
12 The parties would then huddle up, figure out where there was
13 consensus, and where there was disagreement with respect to the
14 value of the assets, and who the different investors in those
15 assets were, and what they thought they were entitled to, and
16 then we would be in a better position to know what was going on
17 in the future. That seems to be the last time, really, that
18 was discussed in a way in which there was consensus.

19 So what if anything has happened since February of
20 2010 to identify the value of the assets, the universe of
21 investors, and the claims of the investors. There have been
22 some investors who have made claims, and then those claims have
23 been petitioned, petitions made and then those were withdrawn
24 pursuant to some settlement with the government. But I'm fuzzy
25 as to what is the universe of investors, how big it is, and how

121avilc

1 comfortable and confident are we that we have reached the whole
2 potential universe.

3 So I'm not sure who --

4 MS. LEVIN: Sharon Levin from the U.S. Attorney's
5 Office. I think I can answer part of that question, but I may
6 need to turn to my colleagues at the SEC to fill in some of the
7 gaps that I have.

8 In the forfeiture case there is a limited group of
9 victims who were investors, and we have those victims and we
10 know the amounts of their losses.

11 JUDGE SULLIVAN: How many are there?

12 MS. LEVIN: There are five.

13 JUDGE SULLIVAN: Just five.

14 MS. LEVIN: Five that are listed in the restitution
15 order.

16 JUDGE SULLIVAN: Oh, the restitution order?

17 MS. LEVIN: Yes.

18 JUDGE SULLIVAN: All right.

19 MS. LEVIN: In addition, to that, there is a larger
20 group that I believe are about maybe 20 to 30. There is an
21 additional group of other investors that were investors in the
22 various different Amerindo funds that will also be considered
23 Amerindo investors for the purposes of any distribution. And
24 to the extent that we have records from Amerindo, we have gone
25 through those records and we have a list. And the SEC has

121avilc

1 provided us with a list of the investors with their last known
2 addresses.

3 JUDGE SULLIVAN: All right, but that's 20 to 30. I
4 assume you have the exact number someplace.

5 MS. LEVIN: Yes, we do.

6 But there may be some question -- Mr. Tanaka raised
7 question in the conference that we had before Judge Swain on
8 September 23, that there might be other investors that we're
9 not aware of that are not included in that list. And this is
10 meant to be, our distribution is meant to be full distribution,
11 that no one is excluded. And so, accordingly, we intend to
12 provide some kind of publication on our office's website and
13 work with Mr. Tanaka or his counsel to come up with additional
14 names and addresses as there are then, and provide them with
15 notice and an opportunity to also put in a petition.

16 JUDGE SULLIVAN: But that hasn't been done.

17 MS. LEVIN: That has not been done, because we cannot
18 begin the petition for omission process until there is an entry
19 of final order of forfeiture.

20 JUDGE SWAIN: Is there an impediment to your gathering
21 the information that would permit you, promptly to go, if you
22 will, on the remission procedure once the final order of
23 forfeiture.

24 MS. LEVIN: There is no impediment. What our plan is,
25 once we have agreement with the defendants, we would like to,

121avilc

1 you know, publish the list, or circulate the list, who we have
2 are the investors, and with their last known addresses and see
3 if there is any additions or corrections and then we're ready
4 to go forward and provide, once we have the order of
5 forfeiture, with a notice of the opportunity to fill a petition
6 for omission or mitigation and a sample petition.

7 JUDGE SWAIN: I noticed on the list of assets that
8 there are a couple of assets that seemed to be identified with
9 employee benefit plans. There is a requirement trust, I
10 believe, and a money purchased plan fund. So has there been
11 any investigation or consideration as to whether there are
12 former employee claims to funds in those particular trusts
13 and/or any trust or ERISA type protections that need to be
14 taken into account?

15 MS. LEVIN: No, those are all things that we're going
16 to turn to when we have control of the assets.

17 JUDGE SWAIN: Again, I ask whether there is any
18 impediment to investigation before you have control of the
19 assets, and to the extent there isn't, do you have a timetable
20 for making these investigations.

21 MS. LEVIN: To the extent that these assets are going
22 to be forfeited, then I can try and have an investigator in my
23 office, move forward on it, and we can go forward and start it
24 tomorrow morning.

25 JUDGE SWAIN: You have a restraint on them already,

121avilc

1 correct?

2 MS. LEVIN: We have a restraint on the accounts.

3 JUDGE SWAIN: And you specifically requested
4 forfeiture of them, and there has been no objection specific to
5 those assets or, indeed, any of the ones on the list, has
6 there?

7 MS. LEVIN: Well, there has been an objection in
8 general to the forfeiture order, and to the entry of the final
9 order of forfeiture. And so the marshal service is not capable
10 of taking possession of the assets and liquidating or managing
11 them at that time. But can we call and investigate as to
12 exactly what there are, are there other parties associated with
13 them, or other parties that are entitled to get notice, there
14 is no impediment to us doing this. We absolutely can provide
15 resources from the U.S. Attorney's Office to look into that.

16 JUDGE SWAIN: Seems to me, given the amount of time
17 that has passed, and the fact that we're not sure of the
18 universe, that it would be appropriate to do as much in advance
19 of finalization of forfeiture as possible, and do that as
20 quickly as possible.

21 JUDGE SULLIVAN: Yeah, I mean I guess I'm surprised
22 that pave work wasn't done right away. Seems to me at the time
23 of sentencing, there was Mr. Marcus on behalf of Mr. Vilar had
24 made a suggestion that maybe we should put off sentencing until
25 after evaluation or liquidation of the assets had taken place.

121avilc

1 And then there was a consensus not to do that, not to wait, it
2 would take too long. But it seemed that there was absolute
3 consensus between defendants and the government that investors
4 should be paid out of the moneys that had been frozen. There
5 was a little bit of dispute as to how much those assets were
6 worth, whether it was 48 million, or 41 or 42 million. But it
7 sounded like there was an awful lot of money to cover the
8 various claims that were anticipated. And so I'm just sort of
9 surprised that we haven't advanced the ball really at all since
10 February of 2010.

11 MS. LEVIN: Well, we can't, your Honor. We can't --

12 JUDGE SULLIVAN: We can't distribute.

13 MS. LEVIN: We can't liquidate. The marshal service
14 can't take possession of the assets.

15 JUDGE SULLIVAN: I understand that. I guess
16 identifying the universe of claims, and identifying or nailing
17 down the value of the assets with some precision, wouldn't seem
18 to be something that has to wait until the final forfeiture
19 orders.

20 MS. LEVIN: There is expense associated. In terms
21 of -- we have a valuation for what the assets are, in the joint
22 letter that we submitted to the Court, it provided the value
23 for the securities, as well as the value for the cash account.
24 What we don't have a value for are for their investments in
25 private companies. And that will cost the marshal service

121avilc

1 between ten and \$20,000 to make those valuations. And,
2 generally, that money will come out of the money that's being
3 distributed. And we have done the valuation once before, but
4 it didn't necessarily seem to be feasible, in advance of the
5 entry of the order of forfeiture, to find out what the value
6 is. Because the dispute isn't as to what the value of one
7 asset is versus the other, it's whether or not we can move
8 forward and start to liquidate them now.

9 As to the claim as to the universe of investors, we
10 actually feel pretty confident that we have a list. Because of
11 the concerns that were raised by Mr. Tanaka, we don't believe
12 we need to have any additional investigation. The U.S.
13 Attorney's Office has a much smaller list because our case was
14 different than the SEC's case. So our victims or our
15 investors, for the purpose of our case, were limited to those
16 victims that are included in the restitution order. We have
17 been coordinating with the SEC, and we have their list, and
18 we're ready to go on it. We don't believe that there really
19 are going to be many other additional people, but we don't want
20 to exclude anybody.

21 I just want to make clear that to the extent it
22 appears like we're not ready to go out and send notice, we
23 absolutely are ready and prepared to send notice out to now --
24 now, we believe we do have the full universe of the Amerindo
25 investors, based upon the SEC's reviews of the Amerindo

121avilc

1 records. So it's not really a question that -- it just may be
2 that if one of them, we have forgotten somebody that Mr. Tanaka
3 knows about, that somehow it is not revealed in the records.
4 But we didn't view this as something that needed a detailed
5 investigation.

6 JUDGE SWAIN: May I ask you this. As to the valuation
7 of the illiquid assets or to the private investments, does your
8 identification of the universe of investors or potential
9 claimants also give you a solid enough sense of the amount of
10 money owed to investors so that you could perhaps determine
11 whether the liquid assets that are held would be sufficient for
12 the distribution, such that the illiquid assets might revert to
13 the defendants, if that's -- you know, if that's the right
14 outcome for excess. I'm wondering whether it is essential to
15 value those assets now.

16 MS. LEVIN: Well, first all, all of it is investor
17 money, so I'm not sure that any of it will actually -- or none
18 of it will actually go back to the defendants. These are all
19 of the investor accounts. There are a few assets that are
20 included in our substitute asset order such as personal
21 property of Mr. Vilar and Mr. Tanaka. But those are not --
22 most of that doesn't have real value or there is not really
23 anything there.

24 In terms of the other investment accounts, my
25 understanding is regardless of whether there is enough to pay

121avilc

1 off all of these investors, the rest of that money doesn't
2 actually belong to Mr. Vilar and Mr. Tanaka. But my
3 understanding, in answering your question, is that I don't
4 believe that the liquid assets will actually cover. It should
5 cover pretty close to it, but we're not exactly --

6 JUDGE SULLIVAN: What is the "it."

7 MS. LEVIN: The amount that is owed each of the
8 individual Amerindo investors.

9 JUDGE SULLIVAN: What does that add up to; do you know
10 what the individual investors are claiming?

11 MS. LEVIN: We think it's around \$44 million.
12 However -- and this information is in large part based upon
13 information that I had from Mr. Litt, when he was on the case,
14 is that there are some Amerindo investors that he has been
15 advised will not be submitting petitions. Among other things,
16 what a common practice is, if there is a hedge fund, sometimes
17 that hedge fund, when it comes time for distribution, no longer
18 is in business under that name anymore and either chooses not
19 to or is unable to claim that money. And that's the experience
20 the Department of Justice often has, is when it comes time for
21 omission or restoration, not all of the investors ultimately
22 will put in a claim. So we think that the amount of money that
23 is available for distribution to the victims should be pretty
24 close to what the loss is that will be filed under the petition
25 for admission or identification process.

121avilc

1 JUDGE SWAIN: And just to be clear, I misspoke when I
2 talked about reversion because, of course, you do have the
3 54 million-dollar forfeiture order. And so any property that
4 would be necessary to satisfy that order, to the extent that
5 it's upheld, would of course go to the United States, as
6 opposed to reverting to defendants.

7 MS. LEVIN: One other thing I want to add is that the
8 restitution order is actually for a larger amount, it includes
9 prejudgement interest. And in our proposal, to come up with
10 some kind of proposal, typically the Department of Justice
11 doesn't seek an agreement from the defendants on distribution
12 of forfeitable assets. We're asking for it here because we
13 would like to do it while the appeal is pending. But in the
14 proposal that I made where we would begin the distribution, the
15 loss to the victims in the criminal case is the amount of
16 their, for the most part, the amount of their loss plus
17 prejudgement interests. That prejudgement interest figure
18 would not be included in this proposed distribution. Victims
19 in the criminal case, and the other Amerindo investors, would
20 be treated exactly the same. They would both be entitled to
21 essentially the amount of money, without interest, that they
22 lost.

23 JUDGE SULLIVAN: Have you shared the names of the
24 claimants that you have identified with the defendants or their
25 counsel at this point?

121avilc

1 MS. LEVIN: I believe that we have -- I believe that
2 that information had previously been provided by Mr. Litt. And
3 I believe that we had previously, the SEC had circulated their
4 list. The information that I have is from the SEC's list. And
5 I believe that they had previously provided the list of the
6 investors, their list of who the Amerindo investors are.

7 JUDGE SWAIN: That was some time ago?

8 MS. LEVIN: Yes.

9 JUDGE SWAIN: And so will you -- are you willing and
10 able to provide the current list to Mr. Vilar's counsel and to
11 Mr. Tanaka promptly for their additions, corrections, or
12 whatever?

13 MS. LEVIN: Absolutely. But I think that our issue
14 that has been holding us up is not the actual list itself and
15 who they are, but whether or not they're willing to agree to
16 the condition for DOJ to distribute the money right now, or to
17 begin the remission process, which is that in the event that
18 the forfeiture is overturned on appeal, that they won't seek
19 the money back from the Department of Justice.

20 We've just been unable to get an agreement or even an
21 answer to that question. If so, we can move forward on that
22 process. So that's what our hold up has been. I don't think
23 there is really an issue with that they don't think that we
24 have -- the defendants or their counsel don't believe that we
25 have a complete list because, as we said, we'll take whatever

121avilc

1 names they give us and provide them. And we plan to put
2 something up on the U.S. Attorney's Office website, which will
3 be a reference to the case, and a sample petition, and an
4 opportunity for anybody else that knows about it to file a --
5 file a petition, as well. So the process should be very
6 inclusive, that anybody that had money in Amerindo.

7 JUDGE SWAIN: So you would be going out to the last
8 known address of the people identified, in addition to putting
9 it up on the website?

10 MS. LEVIN: Absolutely.

11 JUDGE SWAIN: And this agreement that you are talking
12 about, not to go backwards again, but the government is as
13 to -- I think the figure is \$17 million for the preliminary
14 distribution to be divided *pari passu*, or no?

15 MS. LEVIN: Yes, your Honor. But we would be
16 perfectly comfortable in having all of the money distributed
17 now, to have the final order of forfeiture entered, and the
18 marshals to come in and liquidate the assets, everything, and
19 distribute all of the money now. The reason why we ultimately
20 came -- I made the proposal of \$17 million, is there were
21 issues with counsel about the amount of a forfeiture and what
22 was the proper number, because that issue was on appeal. And
23 because this is going through a forfeiture process, to avoid
24 that whole issue. What I proposed was we just limit the money
25 right now to \$17 million to enable at least some money to go

121avilc

1 back to investors. And then with respect to the remaining
2 money, you know, that can wait until the resolution of the
3 appeal.

4 But the government's position is, with the entry of
5 the final order of forfeiture, we're ready, willing, and able
6 to begin the petition for omission or mitigation process. I
7 called the Department of Justice this morning, the Asset
8 Forfeiture Money Laundering Section to confirm that if we had
9 this agreement from the defendants that they wouldn't seek the
10 recovery of the money, that we could go forward under the
11 petition for omission or mitigation process and distribute it.
12 And I also confirmed that the general proposal, last value --
13 you know, the most recent value on the last Amerindo statement
14 would be an appropriate mechanism. And while they can't,
15 without seeing a proposal they can't agree to it, it sounded,
16 you know, generally acceptable to them.

17 JUDGE SWAIN: So that was back in the fall. And but
18 since then you haven't had a definitive answer?

19 MS. LEVIN: No, no. I spoke to them this morning. I
20 had a conversation in the fall. And then recognizing that
21 times change and things could happen, I called to make sure
22 this morning that I can accurately represent to the Court that
23 the Department of Justice would not have -- you know, has
24 indicated that they generally agree with this approach.

25 JUDGE SWAIN: All right. So, at this point, we'd like

121avilc

1 to --

2 Well, Judge Sullivan, do you want to call on?

3 JUDGE SULLIVAN: Yeah, I was going to ask Ms. Shevitz,
4 or Mr. Tanaka, I mean just --

5 MR. JACOBSON: May I say one thing?

6 JUDGE SWAIN: Yes.

7 MR. JACOBSON: With all of the talk about whether the
8 forfeiture order would be reversed later on and these assets
9 would either revert, or not revert, it's the SEC's position,
10 obviously --

11 DEFENDANT TANAKA: I am having difficulty hearing.

12 JUDGE SWAIN: Move the microphone over.

13 MR. JACOBSON: As stated, many of the investors --

14 JUDGE SWAIN: Mr. Jacobson speaking.

15 MR. JACOBSON: Right.

16 Many of the investors are in the SEC case. Our case
17 was stayed up until about a year ago. We have been trying to
18 resolve our case with the defendants and, hopefully, resolve
19 all of the money issues as well before we move forward with
20 either summary judgment or other disposition of the case. But
21 it's certainly the SEC's intention, in the event that a
22 forfeiture order is reversed and these assets become free, so
23 to speak, that he would be seeking relief in the district court
24 in the civil action, again, to restrain the assets, freeze the
25 assets, if necessary seek the appointment of a receiver to be

121avilc

1 able to then distribute those assets in the civil action.

2 So, in our view, under any circumstance, the moneys
3 that are in the accounts, investor accounts, should be going
4 back to those investors, regardless of the ultimate outcome of
5 whether the forfeiture order itself is vacated or reversed or
6 reduced.

7 JUDGE SWAIN: Thank you.

8 JUDGE SULLIVAN: All right.

9 Ms. Shevitz, that was my understanding that there
10 really was a consensus, at least at the time of sentencing,
11 that the investors were entitled to get their money back and
12 certainly the defendants were suggesting that the investors had
13 been sort of put in a bad spot because of the freeze happening
14 when it did.

15 MS. SHEVITZ: Absolutely.

16 JUDGE SULLIVAN: So it seemed like there was real
17 consensus that we would identify investors, investors would get
18 their money back, and if there was some little bit left over,
19 then that might be what was the fight.

20 MS. SHEVITZ: I can tell you the problem. First of
21 all, Mr. Vilar was not at Mr. Tanaka's sentence. So whatever
22 you did at sentencing for Mr. Tanaka, Mr. Vilar was not there.

23 JUDGE SULLIVAN: No, what I just read before.

24 MS. SHEVITZ: Yes.

25 JUDGE SULLIVAN: Mr. Vilar was there. Because that

121avilc

1 was before Mr. Vis sentencing. So what I just read was a quote
2 from Mr. Colton, and that's at page 7 of the sentencing
3 transcript.

4 MS. SHEVITZ: Well that's my point.

5 JUDGE SULLIVAN: And after that, we sentenced
6 Mr. Vilar.

7 But in any event, my point is not that somebody is
8 bound by something that was said there. It seemed there was a
9 consensus that investors had to get their money back, they had
10 been waiting a long time. And everyone, defendants and
11 government, agreed that that should happen and should happen
12 quickly.

13 MS. SHEVITZ: Yes. We would like the investors paid
14 what they are due. We would like all of the claimants paid
15 what they are due. However, we are not willing to give up
16 total control of all the assets and all the, quote, substitute
17 assets, so that the marshal service and the government can
18 start playing with it, now, that they didn't do it for the last
19 6 years.

20 JUDGE SULLIVAN: Can I ask you to define what you mean
21 by "total control?"

22 MS. SHEVITZ: Total control means that what Ms. Levin
23 wants to do is have a final order of forfeiture of
24 \$54 million --

25 JUDGE SULLIVAN: Right.

121lavilc

1 MS. SHEVITZ: Now, your Honor, if you recall, agreed,
2 that --

3 JUDGE SULLIVAN: No, I get all that. I'm just asking,
4 what she is proposing is that, short of an order of forfeiture,
5 that you folks agree and do not consent.

6 MS. SHEVITZ: On consent -- we would consent if we
7 knew the universe of people, if we knew what the claims were --
8 which we have not been given this information. And, even today
9 they say, oh, well maybe there is 20 or 30 people. That isn't
10 good enough. Our clients are people and they still have
11 continuing liability to all of the people who they have dealt
12 with. And they do want to make them whole. But we're not
13 getting the information. And what we have been getting is it's
14 none of your business. And the fact is, it is our business.
15 Right now, Ms. Levin says, well, we'll ask Mr. Tanaka and
16 that's fine, but Mr. Vilar is there, too. He has a say.

17 JUDGE SULLIVAN: I think the point is that you are
18 representing Mr. Vilar for those purposes, it is not clear if
19 Mr. Tanaka is representing himself for those purposes or
20 whether he is being represented.

21 MS. SHEVITZ: Well, regardless, we have both asked, we
22 have all asked for backup, for documents, for something. We
23 don't have input. These defendants have not seen books and
24 records since 2005 since they were kicked out of the business
25 and the business was shut down. How do we know? We can say,

121avilc

1 yes. That's what they want us to do, they want us to say yes.

2 And right now --

3 JUDGE SULLIVAN: I don't know what you want. So you
4 are saying you want -- you want the names of the claimants they
5 have identified --

6 MS. SHEVITZ: We want releases, too.

7 JUDGE SULLIVAN: -- you want to know what the claims
8 are of those persons.

9 MS. SHEVITZ: Yes. Of everybody. And who they
10 contacted, how they contacted them. Because there are people
11 who are -- my client just told me that somebody contacted,
12 through somebody else contacted them, and has a claim, and
13 wanted to know who to talk to. Now, that person isn't
14 contacted. So we don't have books and records. According to
15 the government, we can't do anything, because we're barred from
16 acting as anything. We can't anyway. And they don't want to
17 give us any information. And they don't want to tell us the
18 universe of people. And, today, six years after they shut the
19 business down, they say maybe 20 or 30 others. That is not
20 good enough.

21 JUDGE SWAIN: Well, Ms. Levin just agreed, earlier,
22 that the government would provide you, Mr. Vilar's counsel, and
23 also Mr. Tanaka, with their list of the universe of known
24 claimants.

25 And will you include in that list, also, the last

121avilc

1 account balance that you are proposing to work off -- and this
2 is a question I'm asking Ms. Levin -- and the date to which
3 that last account balance is attributed?

4 MS. LEVIN: Your Honor, we don't have that
5 information. Let me explain. There may be a misunderstanding
6 about what this petition for omission or mitigation process is.

7 This is a process the Department of Justice employs
8 when assets are forfeited. And they're being used as
9 compensation to victims of crime. And the way that the
10 procedure works is that the victim -- and we consider the other
11 Amerindo investors victims by virtue of the SEC action -- file
12 a petition setting forth their loss, how they're a victim and
13 they provide documentation as to what that loss is. And then
14 the Department of Justice reviews it and accepts it or doesn't
15 accept it. We do not have, right now -- we have not been
16 running -- certainly, the U.S. Attorney's Office and SEC can
17 speak for the SEC. But there hasn't been a receiver appointed.
18 And we have not stepped in and been running the investment
19 advisory business. We don't have the last statements for the
20 account holders. Rather, we have a list of names and
21 addresses. And under the petition for mitigation process,
22 those people were given notice, and they will have an
23 opportunity to submit the petition and provide their
24 documentation. That information will be reviewed. My office
25 will make a recommendation. And the investigating agency will

121avilc

1 make a recommendation. And then the Department of Justice will
2 decide.

3 The individual claimant, or petitioner, or victim,
4 does not have to trace their, you know, their property into any
5 particular account. They just need to show that they suffered
6 a loss here.

7 So the universe of claims we won't know until
8 everybody submits a petition. And that will be submitted to my
9 office. We typically -- in fact, I can never recall a
10 circumstance where defendants have been involved in that
11 process. The defendants' interest in this property was
12 forfeited from them by virtue of the substitute asset order.
13 They have no legal right, title, or interest in the property.
14 And what Ms. Shevitz is complaining about is the entry -- the
15 final order of forfeiture we're seeking here is not for
16 \$54 million. The Court has already entered that order and that
17 order is on appeal. The order is a final order of forfeiture
18 as to the specific assets listed in what was in the substitute
19 asset order, so that the United States can have title to that
20 property so it can control it and it can liquidate that
21 property.

22 So, you know, that is how we would go about executing
23 it. But in terms of will the Department of Justice agree that
24 defendants, during the process we should provide all of the
25 claim petitions for them for them to agree or to disagree to

121avilc

1 the amount of the losses of their victims, I can't recall a
2 circumstance where that has ever been done -- of course, I can
3 check with them. But that's not how the procedure typically
4 works. This is not a bankruptcy proceeding. This is one where
5 people who have suffered a loss can come in for relief from the
6 government out of forfeited funds.

7 JUDGE SULLIVAN: But you said a moment ago you are not
8 going to pay out on that until after the appeal issues, right?

9 MS. LEVIN: Yes, your Honor.

10 JUDGE SULLIVAN: So the issue here is what we can get
11 done before the appeal is resolved. None of us know when that
12 is going to be. And you have hit upon the fact that you need
13 the consent or waiver from the defendants, right. And the
14 defendants are saying we're willing to do that, maybe, if we
15 get certain other information that allows us to know that we're
16 not giving away or waiving something that might be significant.
17 What is the downside to doing it this way? It's informal.
18 It's not a requirement. It's an arrangement in order to get
19 people, who are hurting and who have been waiting, something
20 now when they might be able to use it actually.

21 MS. LEVIN: Okay, your Honor, first of all, it's
22 twofold; there is two procedures here.

23 We can begin the process and we can -- DOJ can
24 liquidate the assets and they can start ruling on the petitions
25 without the consent of the defendants. What needs to happen is

121avilc

1 the entry of the final order of forfeiture for the substitute
2 assets. That has not been entered yet.

3 JUDGE SWAIN: All right, but that just got proposed in
4 December, right?

5 MS. LEVIN: Yes, we refrained from doing it because we
6 believed we can enter into, because there is an objection,
7 there was an objection in July filed to the order of forfeiture
8 when I advised counsel that I intended to get it. And we have
9 been trying to work it out since then. But it was just
10 submitted in December, the application for the final order of
11 forfeiture. But that's one. The DOJ, once we have the final
12 order of forfeiture, we can begin the petition process, sending
13 out notice, notifying third parties, and they can submit their
14 claims.

15 What we need the consent of the defendant for is to
16 agree to release the money the claimants, to agree that the
17 money be returned from them. I find it -- I would have to
18 check with the Department of Justice, the Attorney General has
19 absolute discretion over the remission of forfeited funds. So
20 I cannot imagine that as a policy matter the Department of
21 Justice is going to agree to work in conjunction with the
22 defendant reviewing them, particularly because our concern is
23 that defendants are going to submit objections to certain
24 claimants -- you know, certain petitioner's claims. For
25 example, victims that testified against them at trial. They

121avilc

1 have an interest in -- you know or the victims that are listed
2 in the restitution order. And this is not a Court proceeding.
3 This is not going to be resolved by the Court. This is within
4 the Department of Justice at the discretion of the Attorney
5 General. So we're essentially turning this into some kind of
6 adversarial claims proceeding where the defendants that have
7 been convicted of the crime and ordered to forfeit the funds
8 are having a role in deciding which of their victims get how
9 much money.

10 JUDGE SULLIVAN: I think it seems to be an attempt to
11 get passed an adversarial process to allow for parties to reach
12 some agreement so that people can get paid sooner, rather than
13 later.

14 MS. SHEVITZ: Yes.

15 JUDGE SULLIVAN: Because I think what you have said is
16 that, unless there is agreement by then, you're not going to
17 pay out until you get affirmed on appeal. Right?

18 MS. LEVIN: Yes, your Honor.

19 JUDGE SULLIVAN: Yes. So the people who are waiting
20 for their money, are not going to get a nickel until after the
21 Court of Appeals decides, at the earliest.

22 MS. LEVIN: I understand, your Honor. And the only
23 thing I can suggest is, perhaps, an alternative proposal. I do
24 not imagine that the Department of Justice is going to agree to
25 let defendants who have been convicted of the underlying

121avilc

1 offense to have a role in deciding which claims are going to be
2 paid. The only thing I can suggest, otherwise, is that the
3 Court appoint a receiver, perhaps in the SEC action, and that
4 the defendants agree to allow the receiver to distribute the
5 money and maybe under that process the receiver has a say and I
6 mean the defendants can have a role in that process. Because I
7 think, as a policy matter, the Department of Justice is not
8 going to agree to it. I can talk to them and discuss it, but
9 it's their procedure, it's not the U.S. Attorney's office.

10 JUDGE SULLIVAN: I understand that. But you're the
11 one who is saying you want a waiver from the defendants. And
12 they are simply saying, before they sign a waiver, they want to
13 have a better understanding as to what exactly it is that you
14 intend to do. It doesn't seem crazy.

15 MS. LEVIN: We told them exactly what we intend to do.
16 What we intend to do is we intend to accept the petition, send
17 notices to everybody that was an Amerindo investor, and to
18 aggressively seek out the name of anybody else that the SEC
19 doesn't have on their list and that while every Amerindo
20 investor is entitled to recover the balance on their last
21 statement, I believe the date was April of 2005. Whatever the
22 April 2005 statement balance is, that's what they're entitled
23 to.

24 JUDGE SWAIN: And you're looking to the investors to
25 come forward with that statement balance, rather than saying

121avilc

1 you have books and records that at this point reflect that
2 statement balance?

3 MS. LEVIN: Yes, your Honor.

4 The SEC may be able to --

5 JUDGE SWAIN: Mr. Salzberg. And, then, after that,
6 we'll hear from Ms. Eiger.

7 JUDGE SULLIVAN: But I had winked at Ms. Shevitz,
8 because she was jumping up before.

9 JUDGE SWAIN: Ms. Eiger also wanted to speak.

10 MS. LEVIN: Your Honor, I'm a little bit baffled by,
11 we sort of don't understand what the point is of why the
12 defendant needs this information. I understand if we're going
13 to give broad parameters as to what we're doing, last
14 statement, every Amerindo investor is included, why the
15 specific amount that is being paid to the Mayer family, versus
16 Robin Sayko, what difference does that make to the investors,
17 as long as we're stipulating that every Amerindo investor is
18 entitled to their balance as of April 2005.

19 JUDGE SULLIVAN: They just want to make sure that you
20 have got it right. I don't know --

21 MS. LEVIN: We would --

22 JUDGE SULLIVAN: Ms. Shevitz can speak for herself.
23 Mr. Tanaka can, too.

24 MS. LEVIN: Yeah, the point is that that assumes they
25 have a right to contest that amount.

121avilc

1 JUDGE SULLIVAN: No. No, but you made their waiver a
2 condition on the early payment. If that's the condition that
3 you have set, they don't have to waive. And if they have set
4 some other conditions that they want met before they're going
5 to waive, seems to me that's a negotiation, it's not about an
6 adversarial process.

7 JUDGE SWAIN: It also seems to me that this is a
8 somewhat -- I hope this is an unusual instance in which,
9 through a forfeiture process, the government is seeking to take
10 complete title to moneys that everybody agrees at some level
11 belongs to investors, rather than to the defendants. And
12 because of the prior investment and fiduciary relationship, as
13 Ms. Shevitz says there is, in addition to whatever restitution
14 liability there may be in a criminal case, there is exposure of
15 these defendants to follow on litigation to the extent the
16 distribution of these funds is not consistent with the
17 investor's position as to real ownership of or entitlement to
18 the funds. So I think it seems to me that the way you pursued
19 the forfeiture, you have walked into a situation that has wider
20 implications than you might have if you know truly only sought
21 the forfeiture of these defendants' specific personal right,
22 title, and interest in whatever doesn't belong to investors.
23 But that's where we are today. And I think the effort needs to
24 be to make sure that there is a, you know, fair, rationale,
25 documentable, and rapid -- insofar as we can do -- distribution

121avilc

1 of the money that everybody agrees doesn't belong to
2 Messrs. Vilar and Tanaka. And as Judge Sullivan says, the
3 questions that are being asked here don't seem on their face
4 irrational, given the type of situation that we're in and what
5 you're proposing to do is negotiate an interim measure, and
6 negotiations kind of go two ways.

7 MS. LEVIN: Your Honor, I just want to add one
8 comment, which is that -- or one clarification is, it is that
9 the condition that we're imposing is not our condition, it is
10 otherwise if the defendants do not agree, then in the event
11 that the forfeiture is overturned on appeal, the United States
12 government will be required to return that money to the
13 defendants. And the United States government is not gonna be
14 in a position where it's going to be, if money has been
15 distributed to third parties, it is not going to be able to
16 return the money to the defendants. So that's the reason
17 why --

18 JUDGE SULLIVAN: No, I don't think it is saying that's
19 a silly reason, I think we are saying if everybody shares the
20 same goal, which is to get the folks who invested their money
21 back, and quickly, it doesn't seem to be an insurmountable
22 task, it doesn't, to me. So, I guess I'm not sure why we can't
23 sort of work this out, and move towards that goal.

24 MS. LEVIN: Then I propose what I have mentioned,
25 which is my alternative, which is that the Court appoint a

121lavilc

1 receiver and that the receiver go through that process.
2 Because I don't think that under the regulatory requirements of
3 the petition for omission or mitigation process, that the
4 Department of Justice is going to agree to this. Of course I
5 can go back and ask them. But I think there is gonna be a huge
6 obstacle to that, and I just want to raise the alternative that
7 the government agrees to vacate the substitute asset order, and
8 that the Court appoint a receiver and a notification to third
9 parties, to the victims, and then liquidation of assets is done
10 by a third party. We do not want to, in any way, block the
11 victims and investors immediate access to their funds. And to
12 the extent that the forfeiture order is getting in between
13 that, we want to do what we can. But I don't think that under
14 the regulatory scheme for petitions for omission or mitigation,
15 this type of -- the proposal that I have recommended where it's
16 the Department of Justice has absolute authority is one that I
17 think they can do under the stipulated conditions. But I don't
18 believe that it's going to one where they can do so in
19 consultation with defendant. So just I want to raise the
20 alternative.

21 JUDGE SULLIVAN: All right. Ms. Shevitz, you wanted
22 to jump in a while ago.

23 MS. SHEVITZ: I don't know much about the crossover
24 investment exactly that they did, but I'm told that this
25 firm -- and I'm told by some of the people in the well, too,

121avilc

1 that this firm had some very tricky kind of investment
2 crossover -- I don't know what it's called here. But, in any
3 event, the private securities which seem to be dismissed as
4 not -- as irrelevant, are really relevant to the total pot, for
5 one. And we agree that there should be somebody competent to
6 evaluate the privates and figure out what there is for
7 distribution.

8 I am told that that -- and I don't trust the marshals
9 office to do that, frankly. And I don't know if anybody in
10 this room would. But there is a firm, a specialist firm called
11 Mooreland partners, who undertook a similar assignment for
12 Amerindo UK trust in 2005. There are other people who do that.
13 Nobody has wanted to consider this, because Mrs. Levin is stuck
14 on having a liquidation and a remission process.

15 Now, if there should be no forfeiture, there should be
16 no remission process. We object to the remission process, as
17 well, on behalf of everybody because, A, we would like to know
18 our own liabilities here. And, B, why should the Department of
19 Justice have discretion to decide who to pay valid claims.

20 The problem is, we are willing --

21 You look confused.

22 JUDGE SULLIVAN: Well, I mean I think why should the
23 Department of Justice get to do this, they get to do this
24 because there is a forfeiture order. I think the issue is what
25 can we do quickly.

121avilc

1 MS. SHEVITZ: Right. And what we could do quickly,
2 because I read the transcript of the last SEC appearance which
3 was sent yesterday by attachment. And I see that they are
4 willing to move to withdraw the substitute forfeiture --
5 substitute asset forfeiture order and, then, nobody would have
6 to have go through this remission process. And, then, as the
7 Court did with paying the amount to the Mayers back in 2008,
8 seven, I don't know when it was; 2008 or 2009. We could agree
9 to make some payments and it wouldn't have to have this
10 remission process.

11 Now, I, on behalf of the investors I would want to
12 argue for them that why should they have to go through a
13 remission process and invoke the Department of Justice's
14 discretion when, really, it's their money, to a large extent.
15 And we're trying to figure out what it is. We're on their
16 side, to an extent. But we don't want to be on their side and
17 just have everything disappear.

18 Another problem with the substitute asset forfeiture
19 order, as your Honor said when you said that there was a
20 forfeiture that was \$36 million too high, that you would remedy
21 that in the substitute asset forfeiture order, which you did
22 not, with all due respect.

23 JUDGE SULLIVAN: Well, they --

24 MS. SHEVITZ: In any event, there should only be a
25 substitute asset forfeiture order to the extent of \$17 million.

121avilc

1 JUDGE SULLIVAN: But they're proposing all of this,
2 now, as part of an agreement, right?

3 MS. SHEVITZ: No, they are proposing --

4 JUDGE SULLIVAN: Isn't that what you said, Ms. Levin?

5 MS. SHEVITZ: No, they're proposing to take
6 everything, start the marshals liquidating it, which includes
7 the privates, or else they are going to forget the privates,
8 which they really shouldn't forget the privates, because people
9 here tell me that the privates are worth a lot of money. And
10 probably because the funds were not managed, and the privates
11 were not managed, they are sitting in a drawer. And somebody
12 didn't followup on warrants -- is that the words?

13 A VOICE: That's the word.

14 MS. SHEVITZ: Warrants that may have come due, or come
15 up?

16 A VOICE: Expired.

17 MS. SHEVITZ: Expired.

18 JUDGE SULLIVAN: But Ms. Levin's point is that I
19 should sign the order, they have agreed they are going to start
20 distributing up to 17 million, and the rest will wait until the
21 Court of Appeals decides.

22 MS. SHEVITZ: No, the rest will be in the marshals'
23 hands.

24 JUDGE SULLIVAN: But if the Court of Appeals goes your
25 way on this, then the marshals hands give it back, right?

121avilc

1 MS. SHEVITZ: Well, I don't know about that, but the
2 point is --

3 JUDGE SULLIVAN: Why don't you know about that?
4 That's what you said, right, Ms. Levin?

5 MS. SHEVITZ: Because they want it all.

6 MS. LEVIN: Yes, your Honor.

7 JUDGE SULLIVAN: No, she has just said --

8 MS. SHEVITZ: But the SEC then says if they get it all
9 back, then they're gonna take it. I don't know under what
10 theory, because if everybody is paid, everybody is paid. They
11 want to extract blood, you know, if you don't agree, then we're
12 gonna to go for super duper penalties and get more out of you.
13 So we have an interest in retaining a little bit of control of
14 how things are distributed, how things are evaluated. How
15 things are evaluated, especially the privates and distributed.
16 In all of this, we're willing to release money directly to the
17 investors without this remission process.

18 JUDGE SWAIN: Well, let me come back in here and
19 perhaps I have misheard something. But I'm going to first
20 start with -- I mean explain the structure of what I thought I
21 heard as two kind of different stages of proposal and ask
22 Ms. Levin if I have misheard her. And to the extent I haven't,
23 I am going to ask Ms. Shevitz and Mr. Tanaka to respond to the
24 two levels.

25 What I thought I was hearing was that while the

121avilc

1 government's ultimate goal is to get the final order of
2 forfeiture signed and go through the remission process, of
3 which the Department of Justice and marshal service would have
4 total control and which would require the liquidation of the
5 private investments as an interim measure and in advance of the
6 final signing of the final order of forfeiture, the government
7 would be willing to have a pro rata distribution to all known
8 and discoverable investors of \$17 million, which I am hoping
9 you will tell me could be able to be covered by assets that are
10 liquid now, and wouldn't require liquidation of the private
11 investments, and that interim distribution would be conditioned
12 on the defendant's agreement that essentially at least
13 \$17 million of this, for sure, belongs to the investors. And
14 so, whatever happens with the final order of forfeiture
15 process, the defendants would not seek to get the 17 million
16 back from the government, would not say that 17 million didn't
17 really belong to investors and was improperly distributed. And
18 in aid of that, the government would provide to defense counsel
19 and to Mr. Tanaka the names of the people it believes with the
20 SEC are in the universe of investors entitled to share in that,
21 would vet that list with the defendants. And, then, what I
22 think I'm also hearing, is also committed to doing, once the
23 people have responded, would cap the claims of the investors
24 for this distribution purpose at the amount of the last 2005
25 Amerindo statement, and would share out that \$17 million on

121avilc

1 that basis. And that would not require the Court to make a
2 final decision on the proposed final order of forfeiture and
3 would not require resolution of those issues, is that correct,
4 Ms. Levin?

5 MS. LEVIN: Almost. Just a little -- there is one
6 issue that we disagree with. Which is that in order for the
7 assets to be liquidated for the marshals to take control of
8 them and the Department of Justice to go through the petition
9 process, there needs to be a final order of forfeiture. But
10 that final order of forfeiture has no consequence to the
11 defendants. The order that they're objecting to is the
12 54 million-dollar order that is already final and it's already
13 on appeal and it's going to heard by the Second Circuit.
14 Nothing that we're doing here today is gonna change that. They
15 have the same arguments they are making. This is just -- the
16 only issue here is, the substitute asset order forfeited the
17 defendant's interest in those accounts listed there. No third
18 parties have filed claims or petitions for those accounts. And
19 what's left is for the United States to take title to that
20 property. In order for the money to be distributed or for DOJ
21 to go through the remission process, at least for the
22 \$17 million, there needs to be a final order of forfeiture for
23 that amount.

24 JUDGE SWAIN: So there is no way that we can put off
25 to another day the issues with the final order of forfeiture

121avilc

1 and have an agreement to distribute the 17 million on the basis
2 that I described, with everybody reserving their rights as to
3 everything north of, and around, the 17 million so that we can
4 get the 17 million out with no commitment to try for clawback
5 against the government?

6 MS. LEVIN: Well, there is two -- I mean there is sort
7 of two -- there is sort of two ways that can happen.

8 One, that 17 million -- that issue, the 17 million
9 versus 54 million, that issue is already presented to the
10 Circuit. Nothing in the final order of forfeiture, whether it
11 is entered or not entered, nothing is gonna change that. If
12 the Court enters a final order of forfeiture, the defendant
13 stands in the same position.

14 JUDGE SWAIN: I understand that that is your position
15 and I also -- you know, I have got two defense counsel now
16 jumping up to argue with you about that. And so what I'm
17 asking is, is there a way to avoid having that debate, and just
18 dealing with the \$17 million in a way that is sufficiently
19 protective of the government's exposure to any potential
20 claimback and is also sufficiently protective of the investors'
21 rights and the process that is transparent as to the
22 17 million.

23 MS. LEVIN: There is two possible ways I can see doing
24 that.

25 One, is to just have a final order of forfeiture for

121avilc

1 \$17 million worth of cash. The Court just enters a partial
2 final order of forfeiture for \$17 million from one of the
3 various different accounts, and that is the money that is
4 subject to liquidation -- or it's already liquidated, it is in
5 cash anyway in the bank account. And then the other money, the
6 other, you know, placements, whatever, remain in limbo.

7 The other alternative is, which the government would
8 be agreeable to either one is, to the extent that Ms. Shevitz
9 has concerns that the marshal service is not responsible and is
10 not going to be able to -- that they're untrustworthy, or the
11 Department of Justice, we strenuously disagree. But we could
12 agree that we'll have a third party appointed to manage the
13 assets. However, the costs of managing those assets are going
14 to have to come out of those assets themselves. But the
15 government, for the purposes of -- if that's the issue, in
16 terms of the private placements, we could ask the Court to
17 appoint a third party to, you know, take over the management of
18 those assets if that's going to be the obstacle to, you know,
19 to this agreement.

20 I guess a third alternative, which is that
21 \$17 million, we just agree to vacate the substitute asset order
22 for those, and those accounts are done outside the petition for
23 omission process, and a third party is appointed to do that.

24 Those are my three alternatives.

25 JUDGE SWAIN: Okay.

121avilc

1 JUDGE SULLIVAN: I don't remember who was up between
2 you first.

3 JUDGE SWAIN: Ms. Eiger.

4 Mr. Friedman defers to Ms. Eiger.

5 MS. EIGER: I think there is a fundamental issue that
6 we haven't addressed. And I think that we need to address it.
7 And it explains why we need to know who the universe of
8 investors are, what their claims are, and what the size of the
9 pot is. And the reason is that a distribution based upon the
10 last statement balance is fair to all investors, only if the
11 pot is sufficient to cover all claims. Otherwise, it favors,
12 even if the pro rata distribution is made, it favors the
13 investors like the trial victim investors who have received
14 moneys back over time, over investors who may have invested
15 more recently and not received any moneys back. And the
16 government, Ms. Levin, originally when we began talking about
17 resolving this, recognized that one way to do it would be to
18 determine what initial investments were, what investors got
19 back, and to make some kind of equitable distribution in
20 recognition of those factors. And then she determined, well,
21 it was just too hard to do that. And the government then
22 adopted, or then proposed, or pushed, or wants to use this last
23 statement balance. But it creates a problem if the pot is not
24 big enough to satisfy all investor claims. And since we don't
25 have a list of the investors, we don't have an idea, a firm

121avilc

1 idea of their claims, and we don't have an idea how big the pot
2 is, the proposal, I think that we're at an impasse here. And
3 that's, so far as Mr. Tanaka is concerned, Ms. Shevitz
4 obviously has other issues, but that's the crux of our problem.

5 JUDGE SULLIVAN: So you're not going to sign a waiver,
6 is what you mean without --

7 MS. EIGER: I don't think that we can reach an
8 agreement without addressing that fundamental problem.

9 MS. SHEVITZ: Yes. How much is there. How much is in
10 the privates, too. And who are all of the claimants. If they
11 have not done it for now, but they have -- somebody has to do
12 that.

13 Now, in the interim, I guess the only way the
14 government would agree to do this, is if your Honor vacates the
15 substitute asset forfeiture order. Because that would not --
16 that would I guess get rid of their need to do this, whatever
17 it is they do in Washington.

18 JUDGE SWAIN: The remission proceeding.

19 MS. SHEVITZ: The remission proceeding.

20 But so I guess the trigger for that was the substitute
21 asset forfeiture order, I don't know. I don't know why it
22 seems form over substance. But we are willing to do some
23 interim distributions, but we can't agree to waive things
24 without knowing what the facts are.

25 JUDGE SULLIVAN: But the interim distributions, if we

121avilc

1 went that route, would still require consent essentially,
2 right?

3 MS. SHEVITZ: We would consent -- I mean this started
4 with Mr. Begos' clients, the Mayers. And they needed some
5 money. And, okay, this happened before, and everybody agreed
6 to release some and they got some money. And we would agree to
7 do that again and it would be a credit.

8 JUDGE SULLIVAN: But presumably only if you had full
9 information that allowed you to know what --

10 MS. SHEVITZ: Well, I think that we probably could
11 agree to some distribution now, of some small amount that would
12 help to tide them over, if that's what they need, while all of
13 this is going on.

14 JUDGE SWAIN: As I hear it, the waiver that is being
15 requested is an agreement not to make a claim back against the
16 government as to whatever the amount is that's distributed,
17 claiming that the government shouldn't have given that money to
18 investors, or any particular investors, that whatever the
19 agreed interim distribution pool is, is gone, and has been
20 distributed to investors, would you be --

21 MS. SHEVITZ: Yes, that's what happened before.

22 JUDGE SWAIN: And you would be willing to do that.

23 MS. SHEVITZ: If we know what the pot is. If we know
24 what the claims are. And if we know that -- yes. Outside of
25 forfeiture, yes. If it's outside of forfeiture, yes.

121avilc

1 JUDGE SWAIN: If \$17 million or \$10 million, or
2 whatever the number is, is taken out of the forfeiture process
3 and distributed pro rata to claims that are submitted with a
4 cap of the amount of the last statement -- and I say that
5 specifically because of the point Ms. Eiger raised, would
6 defendants be willing to say that amount of money legitimately
7 went back to people who were owners.

8 MS. SHEVITZ: I don't know about the last statement.
9 And I would have to talk to my client. And Mr. Tanaka is on
10 the phone, but I don't think he should make an immediate
11 decision, either, you know. But I think that the answer would
12 be, yes, we want to see people paid, but we want to do it in an
13 orderly way, and in a way in which we have some input because
14 we have continuing liability. Not only here, but in life.

15 JUDGE SWAIN: But if we can get a basis for a proposed
16 structure for further discussion and refinement and a deadline
17 by which you have to get back to Judge Sullivan and me, I don't
18 think that either Judge Sullivan or I would insist that
19 everybody sign something on a dotted line today, but we want to
20 see a time frame that everybody could understand and discussion
21 set.

22 MR. FRIEDMAN: As I mentioned before, although I am
23 sitting at the table otherwise populated by defense counsel, I
24 do not represent any of the defendants, I represent the
25 investors in ATGF, Amerindo Technology Growth Fund. Two of

121avilc

1 those investors are in court today, Mr. Marcus and Mr.
2 Heitkoenig, I also represent Dr. Salvitti. And, together, my
3 clients are the largest single group of investors in ATGF. And
4 I believe they hold well over 90 percent of the total ATGF
5 shares.

6 So while there may be 20 to 30 investors, most of the
7 financial interest is my client's. And I feel, and I'm sure my
8 client would echo this, I'm sitting here listening to this, and
9 we are caught in a cross fire. Everybody in this room agrees,
10 including your Honors, that the goal of the exercise is to get
11 the money back to the investors as rapidly as possible. And,
12 indeed, I sense that Judge Sullivan is concerned that very
13 little has happened since sentencing, leaving the investors
14 without any money. And some clients, like Mr. Begos' has had
15 severe financial need. Mr. Heitkoenig has relatives that have
16 that similar financial need. And yet all we here is carping
17 back and forth between the government and defendants, and
18 nothing is ever gonna happen. So I have an alternative
19 suggestion. It somewhat mirrors what Ms. Levin said, but I
20 must say that I came up with this idea before hearing
21 Ms. Levin.

22 JUDGE SULLIVAN: Do you have proof of that?

23 MR. FRIEDMAN: I have contemporaneous notes.

24 What I think makes the most sense is for your Honors
25 to appoint a magistrate judge to supervise the distribution of

121avilc

1 this money. And I do not see why any consent by defendants is
2 relevant, because everybody agrees that this is not their
3 money, that they held this money in trust.

4 In my letter to your Honors dated November 22nd, I
5 quote from the appellate briefs of Mr. Vilar and Mr. Tanaka in
6 which they acknowledged that they held this money in a
7 fiduciary capacity. If their convictions are reversed, I don't
8 think that gives them any claim to money that was never theirs
9 in the first place. I respectfully submit that the substitute
10 forfeiture order did not give them any claim to assets that
11 were never there in the first place. All that could be
12 forfeited is whatever interest they had. And they had no
13 interest in the ATGF funds, the ATGF 2 funds, or the JP Morgan
14 Chase bank accounts that held assets of those entities. They
15 are not investors, they don't claim to be investors in the
16 funds.

17 If your Honors wanted to put that question to Ms.
18 Shevitz and Mr. Tanaka, right now, I assume they would confirm
19 what I am saying, because they already confirmed it in their
20 letters and in their motion papers. So the way to break this
21 logjam and get the money to the investors and dispense with the
22 DOJ procedure and the fighting about consent, is to appoint a
23 magistrate judge, assign to that magistrate judge the task of
24 marshaling the assets and distributing the assets. And most
25 respectfully, Judge Swain, I don't think there is any basis for

121avilc

1 that to be limited to \$17 million. That should be all assets
2 belonging to ATGF, ATGF 2 and GFRDA, which are the three, I'll
3 call them, for shorthand, investor vehicles, in which the
4 criminal defendants, Mr. Vilar and Mr. Tanaka, have admitted
5 that they have no interest, and all they had was title in a
6 fiduciary capacity. I don't see why we are spending all of our
7 time and your Honors' time talking about whether they will or
8 will not give consent to the distribution of assets they never
9 owned in the first place.

10 JUDGE SULLIVAN: I think the problem -- Ms. Levin can
11 speak for herself. The problem is the government is not going
12 to distribute this until they have a final judgment from the
13 Court of Appeals. Right?

14 MS. LEVIN: Yes, your Honor. But we are -- I mean I
15 don't -- some of the mechanics of Mr. Friedman's recommendation
16 I can't agree to. One, I don't think a magistrate judge
17 necessarily has the authority to, like, liquidate assets and to
18 do -- obviously, they can decide on the various different
19 claims.

20 JUDGE SULLIVAN: Not unless he's brokering a consent
21 or waiver among the parties, right?

22 MS. LEVIN: But Mr. Friedman is actually right. The
23 defendants don't have an interest. These are not their assets.
24 They --

25 JUDGE SULLIVAN: Well, that's your argument. Your

121avilc

1 argument is I should sign the proposed order and then you can
2 do what you are doing, but you're not going to pay a nickel out
3 until you hear from the Court of appeals, right?

4 MS. LEVIN: Yes --

5 JUDGE SULLIVAN: Right?

6 MS. LEVIN: Yes.

7 JUDGE SULLIVAN: Yes. So that's not making you happy,
8 right?

9 MR. FRIEDMAN: No that's exactly what I object to.

10 MS. LEVIN: It's not that I won't, I can't.

11 JUDGE SWAIN: I'm not faulting you. I'm just saying
12 that is the practical reality, as far as you are concerned.
13 That is a constraint on you.

14 If Mr. Friedman's goal, and Mr. Begos' goal is to get
15 their clients' money quickly, then there needs to be some sort
16 of broker process, it seems to me.

17 MS. LEVIN: Your Honor, no matter what we recommend,
18 is that a receiver be appointed who can do all of what Mr.
19 Friedman is suggesting, and what I said at the beginning is my
20 alternative proposal --

21 JUDGE SULLIVAN: Which is the withdrawal of the --

22 MS. LEVIN: Substitute asset order.

23 To allow those who don't want to stand in the way of
24 the --

25 JUDGE SULLIVAN: Because there is no other way to get

121avilc

1 this paid, absent a waiver or a consent of some kind from the
2 defendants, right?

3 MS. LEVIN: Yes, absolutely. This would be the only
4 other alternative. And the government is willing to seek to
5 vacate the substitute asset order, and to allow the appointment
6 of a receiver, and the receiver could handle all of these
7 issues.

8 JUDGE SULLIVAN: Just followup with that. What does
9 that mean for the role of the defendants in that process?

10 MS. LEVIN: I mean, I --

11 JUDGE SULLIVAN: As far as you are concerned.

12 MS. LEVIN: Probably be something that the SEC can
13 answer. What typically happens in an SEC proceeding about what
14 the role is when a receiver is distributing assets.

15 MR. JACOBSON: Typically, the procedure is similar --
16 not a remission process, but a receiver is appointed who has
17 authority over the assets, the receiver comes up with a plan of
18 distribution. Here, limited number of investors, have to be
19 some type of claims process, which would be, again, similar
20 to -- maybe similar to remission process. You have to come up
21 with a way to value each investor's claim. We have heard from
22 defendants counsel that they may not agree exactly how to value
23 an investor's claim. One says you could use the last
24 statement. The other one says you have to look and see what
25 was paid out over time, what was invested in, and come up with

121avilc

1 a net claim. These are issues that come up a lot in SEC cases.
2 And, typically, a receiver tries to look at whatever documents
3 are available, claims that are available, and determine what is
4 the most equitable way to distribute the assets. They then
5 seek Court approval of the plan of distribution.

6 JUDGE SULLIVAN: Right. And that will entail,
7 potentially at least, then, rounds of briefing from everyone as
8 to why this is not the right way to go, right?

9 MR. JACOBSON: Well, someone has to make a decision.

10 JUDGE SULLIVAN: Not necessarily painless decision.
11 It's going to more a fast decision process. Is this receiver
12 process going to be that much faster?

13 MR. JACOBSON: If people object to the way that the
14 receiver determines how to distribute the money, then it won't
15 be very fast, obviously. Plus, we have to go through the
16 process of getting someone appointed, figure out how to get the
17 assets under the civil court's control, perhaps, and the
18 release and everything else. And we have to go back to the
19 Commission to make sure we have authority to do that. That
20 could take some time, although it is not, wouldn't take a year.

21 JUDGE SWAIN: Do these specific funds that Mr.
22 Friedman has been talking about, the growth technology, ATGF
23 funds and other specific funds that he named, have the private
24 illiquid investments in them, as well cash?

25 MS. SHEVITZ: Yes.

121avilc

1 MR. JACOBSON: I don't know.

2 MR. FRIEDMAN: They have basically three categories of
3 assets, as I understand it. They have cash, significant
4 amounts of cash, including one particular account that has
5 \$21 million in it on the basis of the letter that the
6 government wrote to the Court the other day. They also have
7 publicly owned securities, publicly traded securities. They
8 also have privately held securities.

9 Now if I can address the last issue for a moment.

10 There is a potential resource available to everybody
11 in this room that has not been mentioned yet, and that is a
12 person named David Ross.

13 Judge Sullivan may remember, David Ross was, as I
14 understand it, and I was not there, but he was originally
15 engaged by Mr. Tanaka. And he valued -- he is forensic
16 accountant examiner type person. He valued the assets in the
17 ATGF assets, using that as a catch-all broad phrase. He valued
18 those assets as of September 30, 2009. He came to the
19 conclusion that there was \$43 million plus in assets. He
20 stated those conclusions in three letters addressed to Judge
21 Sullivan that were sent in January.

22 In April of 2011, he confirmed, to me, his view that
23 the assets were valued at September 30, 2009 as \$43 million.
24 He has recently stated the view, to me, indirectly through Mr.
25 Marcus, that the asset value, now, is about \$50 million.

121lavilc

1 David Ross has done a very meticulous tracing of what
2 privately held securities -- or what companies whose privately
3 held securities were owned by ATGF were involved in mergers and
4 other corporate transactions such that those privately held
5 securities were replaced by publicly traded securities.

6 Now, apparently, because nobody has been managing the
7 ATGF assets, no one has ever made a claim for those publicly
8 owned securities which are available to ATGF as the record
9 owner, and which could be sold tomorrow.

10 There is work that has to be done. But what I am
11 suggesting is a lot of it has been done by Mr. Ross. And
12 Mr. Ross is available, at a modest fee, to be retained by a
13 receiver, or the Court, or a magistrate judge. And if I could
14 just -- sounding like a broken record -- go back to the
15 magistrate judge. Does not the Courts, and I guess I mean
16 Judge Sullivan primarily in the criminal case have -- and maybe
17 I mean both of your Honors -- have an inherent equitable power
18 to do justice here to assign to a magistrate the task of
19 distributing these assets. It would seem to me that's in the
20 inherent equitable powers of the Court. And what I would
21 suggest is, again, the consent of the defendants does not
22 matter, because they do not have any interest in the assets.
23 Their legitimate interest is to make sure that what's being
24 distributed are assets of ATGF, and not their apartments or
25 pension plans or resources, some of the other subjects covered

121avilc

1 by the forfeiture order. But they do not have an interest in
2 ATGF assets. And by way of response to Judge Sullivan's
3 question, I think that may make the distribution process an
4 awful lot faster. If there aren't going to be any objections
5 from the defendants because they don't have standing because
6 they don't have an ownership interest, I don't think it's a
7 very complicated process.

8 And in other words --

9 JUDGE SULLIVAN: I would be curious to hear from Ms.
10 Levin whether she thinks the Court has the inherent power to
11 just start dividing up assets and ordering payments. I think I
12 know what you're going to say, but --

13 MS. LEVIN: The one way that the Court could do it is
14 under the -- what initially happened when we filed a substitute
15 asset order, was that we sent notice to, you know, published
16 notice. And a few claimants, a few Amerindo investors filed
17 petitions. They ultimately withdrew them to allow the money to
18 be distributed under the petition process. But the Court could
19 invite all Amerindo investors to submit petitions. And then
20 the Court, and the Court could appoint a magistrate judge, to
21 just divide up among the Amerindo investors how much they were
22 entitled to get out of the substitute assets.

23 Typically, they wouldn't have standing, because you
24 have to have an interest in a specific asset. But in light of
25 what's going on here, the government isn't going to make that

121avilc

1 objection. And the government will allow, if the Court
2 chooses, to have -- you know, won't object to it. And, you
3 know, a magistrate judge could decide the issue of what the
4 amount of each investor is entitled to.

5 The issue of -- I don't think that a magistrate judge
6 has the authority to sort of step out of the courtroom and
7 actually liquidate the assets or manage the assets. I think
8 that a third party is gonna need to come in and ultimately be
9 that distribution agent to do that. I don't think the Court
10 can open up a bank account, and liquidate the assets, put the
11 money in there. That's typically what a receiver does.

12 JUDGE SWAIN: Seems to me it would require a receiver
13 or special master, or be done to some devolution to the civil
14 side.

15 THE COURT: Did you want to be heard?

16 MR. BEGOS: I do think I have an answer to how this
17 can be done. But before I get there, I do just want to say
18 everything that we have been talking about today involves
19 months. It involves taking significant amounts of money,
20 figuring out who gets what, deciding who is going to make the
21 determination, everybody gets to weigh in, and money gets
22 distributed. My clients don't have months. They don't have
23 medical insurance. They have medical problems that they have
24 not been able to deal with.

25 Dr. Mayer is literally dying, and they don't have

121lavilc

1 money to bury him, if and when he does die. Their house is in
2 foreclosure. They can't afford to heat it. My clients are
3 literally almost out on the street. And they don't have
4 months. And so the number one priority I have today is to try
5 to get a documented agreement, today, that they get money to
6 survive the months that all of this other process, however it
7 ends up looking, will take. And I do have an issue if it
8 doesn't happen today, because I have spent the last 2 years
9 begging the defendants' lawyers to do something.

10 After the last SEC hearing before Judge Swain in
11 September, I wrote to defendants because they had told Judge
12 Swain, as they said here today, they don't object to money
13 being distributed, they don't object to some special
14 distribution to people like the Mayers who are in desperate
15 situation. I wrote to them in September and asked them for
16 money, and didn't hear one word back from them, other than a
17 cursory, we'll talk to our clients and get back to you.

18 So I have a very -- the only time they agreed to give
19 money was when there was something in it for them. Before the
20 sentencing, they agreed to give \$150,000 to the Mayers. I have
21 a real concern that if we walk out of here today without
22 something on the record saying, however it's documented, the
23 Mayers can get some money to survive for the next two, three,
24 six months, whatever it may be, we're not going to get it.

25 JUDGE SULLIVAN: Well, you're not going to get it

121avilc

1 unless there is a waiver from the defendants that the
2 government is prepared to consider a green light and to start
3 distributing money, right.

4 MR. BEGOS: They did agree -- what Ms. Shevitz said
5 was they were agreeable, at least on Mr. Vilar's behalf to
6 doing something like was done back in 2009 where \$150,000 was
7 distributed to the Mayers. I would like more, because
8 \$150,000, it's a lot of money, but it's not gonna do a lot for
9 them in the situation that they're in right now. But there was
10 a -- there was just a simple stipulation that was signed by the
11 parties, it was signed by your Honor, that resulted in the
12 direct wiring of money from Bear Stearns to the Mayers.

13 JUDGE SULLIVAN: Right. No, I remember that. But
14 that if we do that, if I we withdraw the prior order, then it
15 requires basically consent, right, Ms. Levin, that's your --

16 MS. LEVIN: No, your Honor, we don't --

17 JUDGE SULLIVAN: No?

18 MS. LEVIN: We would need the defendant's consent to
19 release that amount of money.

20 JUDGE SULLIVAN: Right.

21 MS. LEVIN: But the government will agree --

22 JUDGE SULLIVAN: But still requires some consent.

23 MS. LEVIN: Yes.

24 JUDGE SULLIVAN: The issue is are the defendants
25 prepared to consent for the really small, relatively small

121avilc

1 amounts, designed to help alleviate drastic situations for
2 people.

3 MS. SHEVITZ: We have said that repeatedly, yes. And
4 Mr. Begos says to me, I didn't give him any money? How could I
5 do anything with this?

6 MR. BEGOS: I wrote an e-mail to Ms. Shevitz. She
7 said she would speak to her client, never got back to me.

8 JUDGE SWAIN: Let's not go back --

9 MS. SHEVITZ: There is nothing I can do.

10 JUDGE SWAIN: Let's not go back there, I want to
11 ask --

12 MS. SHEVITZ: But, yes, we would agree to a
13 distribution --

14 MS. EIGER: I would --

15 THE REPORTER: Hold on, I didn't get that.

16 JUDGE SWAIN: So just for the record, Ms. Shevitz
17 said, yes, we would agree to a distribution to tied them over.
18 Ms. Eiger said as would we.

19 MS. EIGER: Yes.

20 JUDGE SWAIN: Mr. Begos, what are you looking for in
21 terms of an amount that would, say, take them through immediate
22 expenses in the next 6 months.

23 MR. BEGOS: For the next six months, your Honor, what
24 I had asked for in my e-mail to Ms. Shevitz and to Ms. Eiger's
25 firm, I went through the mortgage arrears that they had. And

121avilc

1 this is actually attached as -- it's part of the e-mail chain
2 that is attached to the final exhibit, Exhibit E of Ms. Levin's
3 January 8, 2012 letter. It's really the last two pages of that
4 document.

5 There are mortgage arrears, there are tax arrears,
6 utility arrears.

7 JUDGE SULLIVAN: What's the bottom line.

8 MR. BEGOS: The bottom line to get them on sound
9 footing and be able to get them through the next six to 12
10 months, was \$2.8 million.

11 MS. SHEVITZ: No.

12 MR. BEGOS: The monthly expenses that they have, going
13 forward, approximately -- I mean they have a hundred thousand
14 dollars of repairs they need to do on their house they have not
15 done, leaking roofs.

16 JUDGE SWAIN: What is necessary to stop the
17 foreclosure proceedings, pay medical expenses and, you know,
18 that absolutely positively needs to be done within, say, the
19 next 6 months. What's that number.

20 MR. BEGOS: To stop the foreclosure proceeding my
21 estimate is that it would require paying the mortgage arrears,
22 which is \$800,000 approximately.

23 JUDGE SWAIN: And living expenses on top of that, and
24 provision for potential funereal expenses would add, what?

25 MR. BEGOS: Future mortgage payments, \$17,000 a month.

121avilc

1 Insurance, utilities, food, real estate taxes, approximately
2 \$28,000 per month. The necessary repairs were approximately
3 \$81,000.

4 JUDGE SULLIVAN: That includes medical expenses,
5 according to your e-mail, right?

6 MR. BEGOS: Correct, your Honor.

7 JUDGE SWAIN: Would the repairs include medical
8 expenses?

9 MR. BEGOS: Yes. Necessary repairs and anticipated
10 medical expenses was \$81,000. I also had a couple of other
11 numbers in there, past due real estate taxes, utilities, and so
12 forth, as well as taxes that they would be paying on whatever
13 money is distributed to them. Obviously they can make do with
14 less, but I did try to give as accurate a number as I could so
15 we were not in another situation in three months or six months
16 coming back and going through the process again.

17 JUDGE SWAIN: And so these are figures, the future
18 expense figures are on a 24 month basis, so that 408,00, and
19 672,00, and 81,000 are on a 24 month basis?

20 MR. BEGOS: The \$28,000 is per month. The 17 -- yes,
21 your Honor, that is correct, that's on a 24 month basis.

22 JUDGE SWAIN: And the 1.2 million,
23 1.16 million-dollar number under past due amounts would be
24 amounts that are necessary to stop the mortgage foreclosure
25 proceedings and cure the arrears on real estate taxes and

121avilc

1 things like that?

2 MR. BEGOS: That's correct. It's my assumption that
3 if and when the past due mortgage payments were paid, that the
4 bank would de accelerate the mortgage and stop the foreclosure
5 proceeding. I actually have no guarantee about that, but. You
6 know, I prefer to pay off the mortgage but, obviously, that is
7 not gonna be in the cards right now.

8 JUDGE SWAIN: So the first -- that first group is 1.16
9 million dollars. The second group, the 24 month figure, is a
10 little over -- looks like a little over million dollars. I
11 didn't look at the income tax figure. That is 500,000
12 estimated on a distribution. There is no return of principle
13 argument there? I mean you are assuming that this is all
14 taxable as long term capital gains at 15 percent on some much
15 larger number?

16 MR. BEGOS: I believe that is the assumption, your
17 Honor, although I'm not a tax lawyer, I didn't calculate that
18 number. But I believe that is the assumption.

19 JUDGE SWAIN: Well, to the extent we're going to go
20 down that road, I think you need to revisit that assumption if
21 this is essentially besides the \$150,000, the first amount
22 coming out.

23 But let me just sort of offer up a plug figure here
24 for arrears and say six months. If what we're talking about
25 is, I'm going to call it \$1.8 million.

12lavilc

1 MS. SHEVITZ: That's a lot of money.

2 JUDGE SWAIN: I know that's a lot of money. What is
3 the overall amount of the claim, I'm sure it is in here
4 somewhere, but I don't have it, of the Meyers' claim.

5 MR. BEGOS: Principle is about \$11 million dollars
6 that was invested, all cash in 2000. It was by rollover from a
7 maturing investment, matured in 2003. And there is
8 approximately \$7 million in interest. So the total number that
9 was in the restitution order is about \$18 million. Of that, 11
10 point something is principle, so we're talking --

11 JUDGE SWAIN: The interest is prejudgement interest?

12 MR. BEGOS: Prejudgement interest, yes, your Honor.

13 JUDGE SWAIN: So we're talking original investment
14 amount of 11 million. There is the plug figure of about 1.8 is
15 roughly 15 percent of that principle investment amount.

16 MR. BEGOS: Correct, your Honor.

17 JUDGE SWAIN: Before I higher from the shaking heads
18 at the defense table, I want to ask the government, do the
19 government and SEC believe that there will be sufficient, in
20 terms of the assets that are known, to pay all investors at
21 least 15 cents on the dollar?

22 MS. LEVIN: Yes, your Honor. We do believe that there
23 are sufficient funds to pay each investor 15 cents on the
24 dollar.

25 JUDGE SWAIN: And so then my question would be if

121avilc

1 there were an agreement to carve out \$1.8 million from the
2 substitute assets order, obviously to be credited against any,
3 you know, additional claim by the Mayers, against funds to be
4 distributed, would the defendants agree to permit the
5 distribution of that carved out 1.8 to the Mayers under an
6 agreement that the defendants would not seek to hold the
7 government liable for improper distribution of the 1.8. And
8 then, of course, for the rest of the investors and for the
9 health and ultimate termination of this process, I would want
10 to walk away today with some sort of structure that people are
11 supposed to be discussing among themselves, whether that's
12 magistrate, special master, or some other -- or a receiver,
13 because there would have to be some sort of expert involved in
14 liquidation and valuation. And our magistrate judges are
15 wonderful judicial officers, but they are not financial experts
16 or bankers or anything else. But leaving that aside for a
17 minute, I would like to focus on the 1.8. And I see Ms.
18 Shevitz and Ms. Eiger consulting with each other. And I know
19 Mr. Tanaka has been very patient and quiet on the phone here,
20 but I would first like to hear from counsel in the courtroom.

21 MS. SHEVITZ: We really don't have the figures to
22 really test it out. And I mean what comes to mind, now, is if
23 this money is not gonna, for sure, stop the foreclosure, why
24 are they still living in this house, frankly.

25 MR. BEGOS: They can't sell it. It is in foreclosure,

121avilc

1 and it is not worth what the bank wants for it.

2 MS. SHEVITZ: There is probably other ways to mitigate
3 this but, you know, I just don't want to come to a situation
4 where other people clambering for money, and these folks got
5 1.8. I don't know.

6 MS. EIGER: It's A larger number than I contemplated
7 as a hardship distribution. I would at least like to have an
8 opportunity to confer with my client.

9 MS. SHEVITZ: Yes. I would have to speak with my
10 client, too.

11 JUDGE SULLIVAN: The e-mail is a long time ago, right?
12 September 27th.

13 JUDGE SWAIN: They asked for 2.8 million in September,
14 knocked it down by a million.

15 JUDGE SULLIVAN: You haven't talked to your client
16 about this request from Mr. Begos?

17 MS. SHEVITZ: No. We had this major -- initial
18 problem that they were not gonna let us agree to anything
19 without a total forfeiture. That was it.

20 JUDGE SWAIN: Okay, well, we --

21 MS. SHEVITZ: There was no negotiation or agreement to
22 do anything like this. We said we would be willing to. And,
23 no, after that, there was no reason to talk to the clients of
24 that specific amount of a carveout, because Ms. Levin has
25 repeatedly taken the position that we're not going to do that

121avilc

1 at all, she's going to do the remission proceeding and that's
2 it. And we had no interest in saying anything. So, that's
3 why.

4 JUDGE SULLIVAN: How long do you think it would take
5 you to confer with your clients and get back to the Court with
6 respect to that specific request, 1.8 million.

7 MS. SHEVITZ: Well, we could do that. I guess I could
8 do a phone conference at Fort Dix. Although the Court might
9 have to expedite that, because I hear that there is a
10 problem --

11 JUDGE SULLIVAN: That's fine, but you think end of the
12 week?

13 MS. SHEVITZ: Let's say next week.

14 JUDGE SWAIN: Next Monday?

15 JUDGE SULLIVAN: Monday is Martin Luther King.

16 JUDGE SWAIN: Next Wednesday, the 18th.

17 MS. SHEVITZ: Yes, I could definitely talk to them by
18 then.

19 JUDGE SWAIN: Ms. Eiger, would you talk to Mr. Tanaka
20 by the 18th?

21 MS. EIGER: I can.

22 MS. SHEVITZ: I kind of would like to hear all of the
23 other people.

24 JUDGE SULLIVAN: I was going to ask Mr. Friedman, on
25 behalf of your client, you said some of your folks are

121avilc

1 destitute. Are they as destitute as that. I feel like George
2 Bailey at the end of the story, what do you need States to tide
3 you over.

4 MR. FRIEDMAN: I do not want to get into a contest of
5 sob stories. And I don't want to minimize the mayors'
6 position.

7 JUDGE SULLIVAN: Right.

8 MR. FRIEDMAN: I can tell you that Mr. Heitkoenig who,
9 if the Court would agree, can address the Court directly, has
10 an uncle -- cousin in Haiti who has already been foreclosed on
11 and is destitute. And Mr. Heitkoenig's investment is on behalf
12 of that cousin.

13 JUDGE SULLIVAN: How much?

14 MR. FRIEDMAN: I don't know the numbers. Would it be
15 okay for Mr. Heitkoenig to address --

16 JUDGE SWAIN: Talk to Mr. Heitkoenig.

17 MR. FRIEDMAN: Okay.

18 MR. BEGOS: Would it be possible to have some amount
19 of money cleared today while defense counsel are talking with
20 their client. Presumably there is an amount of money that they
21 would agree to. And then they can discuss with their client
22 the \$1.8 million, get back to all of us in the court. But they
23 should be able to agree to some amount of money today.

24 JUDGE SULLIVAN: I'm not sure that Ms. Shevitz can,
25 without conferring with her client. Do you think so,

121avilc

1 Mr. Begos?

2 MR. BEGOS: Well, she did tell me back in September
3 she was conferring with her client.

4 JUDGE SULLIVAN: With respect to a particular number?
5 I don't know, if she has had this conversation, and her client
6 has authorized her to consent to some number, then I guess she
7 might be in a position to do this. But absent that kind of
8 communication, I think she might have trouble pulling the
9 trigger on something today, don't you think.

10 I understand your concern, but I'm just not sure how
11 she can responsibly agree to something without running it by
12 her client.

13 MR. BEGOS: I understand. And I have a feeling that
14 next week we're going to hear no. And, then, I'm not sure
15 where we're gonna be, and I'm not sure where my clients are
16 going to --

17 JUDGE SWAIN: Well, the response, next week, needs to
18 be a response to the 1.8. And if there is an issue with the
19 1.8, since there has been an agreement for some time in
20 principle that some tide-over amount is appropriate, there
21 needs to be a specific other number with a justification for
22 the other number. And that number would need to be in at least
23 six figures.

24 MS. SHEVITZ: Well, Judge, we can't really do a total
25 justification for some other figure, again, without --

121avilc

1 JUDGE SWAIN: I understand that.

2 MS. SHEVITZ: So, last time, the defendants agreed to
3 \$150,000. So, in my mind, I was thinking in terms of something
4 like that. So this is a huge difference. And if the
5 government is agreeing to this, too -- I would like to know
6 what the government is agreeing to, and what their basis is --

7 JUDGE SULLIVAN: I think they are inclined to agree to
8 anything you are willing to agree to; right, Ms. Levin?

9 MS. LEVIN: We want the money to go back to the
10 victim, and we're willing to, in any way that we can possibly
11 do, to facilitate that process. We want to do it. And,
12 unfortunately, we're hampered by what we can do under the
13 petition process and what we can do under the forfeiture law.
14 But as long as it's legally permissible, we're in favor of
15 doing it.

16 JUDGE SULLIVAN: Ms. Shevitz, you're not suggesting
17 that the Mayers are not entitled to, you know, more than a
18 couple of hundred thousand dollars, right. There is no dispute
19 that they invested a lot of money, that they are entitled to
20 get that money back, and it's in the millions, right?

21 MS. SHEVITZ: To what extent in the millions is an
22 issue, but, yes.

23 JUDGE SULLIVAN: But north of 1.8.

24 MS. SHEVITZ: I would say that's probably true.

25 JUDGE SULLIVAN: So, again, I just don't think that is

121avilc

1 that much --

2 MS. SHEVITZ: I defer to Mr. Tanaka on that issue.

3 JUDGE SULLIVAN: Okay. Well, if Mr. Tanaka wants to
4 speak, I guess he can, but he may want to confer with counsel,
5 first.

6 JUDGE SWAIN: Mr. Tanaka, are you still there?

7 DEFENDANT TANAKA: Yes.

8 JUDGE SWAIN: I think Mrs. Eiger is going to be in
9 touch with you very promptly, so I won't put you on the spot.

10 DEFENDANT TANAKA: Maybe if it is --

11 JUDGE SWAIN: Mr. Tanaka, Mr. Tanaka. The court
12 reporter is still having trouble hearing you clearly, so please
13 speak as slowly and as loudly as you can.

14 Thank you.

15 DEFENDANT TANAKA: Thank you. I'm saying that the
16 Mayers have been our clients for 20 years. And in the
17 interests of equality for all our clients, and knowing what I
18 know about the Mayers, I'm not as sympathetic as is the Court
19 is, because for the simple reason that, for example,
20 Mr. Friedman's client, Paul Marcus is 84 years of age, has not
21 received a penny, hasn't been saying anything. I am sure he
22 would like to see a penny or two in next year or two.

23 What I know about the Mayers is their personal
24 spending habits have given them troubles for 20 years. And at
25 one time, as I point out to the New York State Court, they

121avilc

1 received a hundred thousand dollars, tax free, which still
2 didn't tide them over. So they have been having problems for
3 all of 20 years that I have known them.

4 On top of that, in this particular case, they've had a
5 civil suit in New York State court and, basically, what I think
6 they're doing is trying to jump the queue on other investors,
7 and I'm not very sympathetic about that. They wanted to have,
8 what I said was a grab and run, where they get a judgment in
9 New York State Court ahead of other investors. So, therefore,
10 I am not particularly sympathetic of the Mayer situation ahead
11 of anyone else.

12 JUDGE SULLIVAN: Well, I mean I don't know that it
13 requires sympathy, necessarily, it require agreement to have
14 that money --

15 DEFENDANT TANAKA: Don't forget, they have a payment
16 to them which no one else has gotten.

17 JUDGE SULLIVAN: But, again, I think the issue is can
18 you and Mr. Vilar agree that some amount of money would go
19 sooner, rather than later, to the investors, including the
20 Mayers.

21 DEFENDANT TANAKA: Well, looking at their letter, the
22 figure was somewhat north of \$2 million, I said to myself, this
23 is really injustice, looking at other investors. Why should
24 they have such a huge lump sum ahead of time, especially since
25 they already had a prior payment.

121avilc

1 JUDGE SULLIVAN: All right. Mr. Friedman, did you
2 want to --

3 MR. FRIEDMAN: I did. I have an answer to your
4 Honor's question and a comment.

5 With regard to Mr. Heitkoenig's cousin in Haiti, he
6 informs me that \$50,000 would tide that person over. \$50,000
7 goes a lot further in Haiti than it does in the United States
8 as we all could recognize.

9 The other point I want to make is with regard to Mr.
10 Marcus, who is the person I am pointing to. He doesn't look
11 it, but he is in his eighties. He and his family are the, as I
12 understand it, the largest single investor in ATGF, with four
13 to \$5 million -- I think that's right, close to \$5 million
14 worth of investments. As Mr. Tanaka just said -- Mr. Tanaka
15 actually said it as well or better than I could say it. Mr.
16 Marcus has never gotten a penny. Now, I cannot in good
17 conscience claim that Mr. Marcus is destitute, because he is
18 not. So I'm obviously not going to stand up here and talk
19 about his need for money. But what I can stand up and talk
20 about is fairness.

21 If the Mayers are going to get 500,000, a million,
22 2 million, Mr. Marcus owns a much greater interest than the
23 Mayers do in ATGF. And we're talking about ATGF funds. So
24 there has to be some basic equity if there is going to be an
25 interim -- on the interim distribution; in other words, a

121avilc

1 distribution today, or tomorrow, or next week. I don't think
2 it is appropriate for only the Mayers to be considered. And I
3 don't even think it's appropriate for only the Mayers and Mr.
4 Heitkoenig's cousin in Haiti to be considered. Other investors
5 have to be considered as well.

6 JUDGE SWAIN: Are the ATGF funds the only source of
7 liquidity here? I'm asking the government.

8 MR. NAFTALIS: They are all lumped together. The
9 ATGF, plus the private clients' GFRDA funds are all in the same
10 basket, all of the different kind of private accounts are in
11 the same bank accounts. So, yes.

12 MR. FRIEDMAN: And I would just add that there are two
13 accounts which account for 24 million, plus. And I guess Mr.
14 Naftalis' comment goes primarily to those two accounts, because
15 that's where most of the money is. And I was reading from the
16 government's letter of December 30 to your Honors.

17 JUDGE SWAIN: Well, I hear the equity point. I hear
18 the delay points, which are compelling all of the way across
19 the board. But the specific requests that are being made now
20 are requests are being made on the representation that it's
21 keeping somebody within their threshold while we work out the
22 larger interim distribution issue. And it gets more
23 complicated and more delayed to the extent that we try to work
24 out some sort of proportional thing for a very small amount of
25 money and then have to revisit that sort of mechanism in what I

121avilc

1 hope, intend, and anticipate will be a short period of time in
2 dealing with something that is like \$17 million. And so my --
3 one second, let me just consult with Judge Sullivan.

4 (Pause)

5 Before we are specific about what has got to be in
6 this universe of desperation situations, I see there are a
7 couple of other counsel standing, are there other investors
8 whose representatives today want to inform the Court of what
9 they would contend are desperation situations on the order of
10 the ones that have been identified on behalf of the Mayers and
11 Mr. Heitkoenig's cousin?

12 MR. HALL: Thomas Hall. I represent one of the
13 investors, Robin Sayko.

14 Frankly, I didn't come here prepared to delineate the
15 extent to which her financial hardship may or may not exist.
16 But I can state that I know my client's recently gone through a
17 divorce. And I would welcome the opportunity that if we're
18 gonna address these things on a sort of ad hoc basis to put
19 forth what, you know, her financial situation is, because I
20 believe she does have significant needs, as well. But I can't
21 stand here and represent to your Honors this afternoon as to
22 what her mortgage arrears are or anything like that. But I
23 would welcome the opportunity to do that if we could.

24 Secondly, and I don't know whether your Honors want me
25 to be heard on the other issues, the process issues. But as I

121avilc

1 sat here and listened to all of this, in my mind it sounds like
2 the type of thing that is done in bankruptcy court all of the
3 time, where you have a universe of creditors or claimants, you
4 set a bar date, people come in, they set put forth their
5 claims, and you have a receiver or magistrate or somebody who
6 is gonna make a determination on those claims, and you have a
7 process where people can object. Whether that is Vilar or
8 Tanaka. And I recognize the argument that maybe they don't
9 have standing to object because it never was their money to
10 begin with. But I, frankly, don't understand and, you know,
11 taking the lawyer hat off the client certainly doesn't
12 understand why, after 6 years, six and a half years, there is
13 still this logjam and this money is going nowhere. So I would
14 greatly urge this Court, both of your Honors, to put some sort
15 of process in place. And it sounds to me like this remission
16 process is not going to work. And I think some sort of --
17 again, something similar to what is done in bankruptcy court
18 all of the time. But let there be a bar date, let's finalize
19 the universe of claimants. We're now 6 years since the
20 accounts have been shut down. I would think everybody has come
21 forward who is gonna come forward, and let's have somebody make
22 a determination on the claims.

23 Thank you.

24 JUDGE SWAIN: Thank you.

25 Sir.

121avilc

1 MR. WRIGHT: Yes, good afternoon, I'm Timothy Wright,
2 I'm counsel for Peter Lusk, who is sitting right there.

3 And I would like to make just a few points to the
4 Court, if I could.

5 First, there are certain assets that are comprised of
6 the pension assets, for example, that are out of the universe
7 of Amerindo investors. Or that is my understanding.

8 In the case of my client, Mr. Lusk, he was part of
9 three people who lent Alberto Vilar sufficient moneys to make
10 his bail. Mr. Vilar then asked Mr. Lusk if he would convert
11 those funds to enable him to hire defense counsel in his
12 criminal case. He subsequently lent additional money to
13 Mr. Vilar. Mr. Lusk has a claim against Mr. Vilar in his
14 individual capacity. We are contemplating bringing an action
15 to seek a judgment. And if the broad scope of the substitute
16 asset order puts in jeopardy, in our view, assets that should
17 be available to satisfy the individual claims of Mr. Vilar,
18 which are separate and distinct from claims of investors in the
19 Amerindo funds.

20 JUDGE SWAIN: You said the individual claims of
21 Mr. Vilar, you mean -- did you mean the say the individual
22 claims of Mr. Lusk?

23 MR. WRIGHT: I'm sorry, yes, of Mr. Lusk.

24 JUDGE SULLIVAN: He is an investor, or he is not an
25 investor?

121lavilc

1 MR. WRIGHT: He is not an investor. He individually
2 and separate and distinct to the Amerindo funds, lent money to
3 Mr. Vilar to assist him in his defense in the criminal action
4 and now he has a claim against Mr. Vilar, personally, for the
5 return of the funds that were lent to him, to Mr. Vilar.

6 JUDGE SWAIN: So these are funds that were lent after
7 the commencement of the prosecution, and not funds that are
8 contended represent moneys held in a fiduciary capacity. It's
9 a general unsecured claim as against Mr. Vilar's personal
10 right, title, and interest in whatever he has a right, title,
11 and interest in?

12 MR. WRIGHT: Yes, that is correct. And the reason I
13 am here today is, as I understand it, the very broad scope of
14 the substitute asset order, means that all of Mr. Vilar's funds
15 are basically subject to forfeiture. And we have an interest
16 in seeing this Court administer the fund properly, pay back the
17 investors. We would hope that there will be an excess left
18 over that will be subject to a claim by Mr. Lusk against Mr.
19 Vilar. So we have an interest in seeing that the private
20 securities are, the value of those private securities are
21 maximized to the extent possible. And we have no concern or
22 claim about investor funds being paid back to investors, but we
23 are concerned that investor funds and personal funds are not
24 commingled to the detriment of there being no possibility for
25 an excess reverting back to the defendants.

121avilc

1 JUDGE SWAIN: Well, it seems to me that the claims
2 process should have the opportunity for people to make whatever
3 kind of claim it is, explaining the type of claim it is, and
4 also the opportunity for, for instance, the government to
5 object that its forfeiture claim -- to talk about priority of
6 claims, the government might take the position that a
7 forfeiture claim comes ahead of a post prosecution claim, but I
8 don't think it is necessary to deal with the resolution of that
9 up front in connection with the question of how to get investor
10 money back to the investors.

11 So as long as you have an opportunity to make that
12 claim as against the amount targeted for ultimate forfeiture
13 and, you know, whether that's in a remission process or
14 whatever, does that satisfy your concerns, that you are not
15 shut out of that process of claimsmaking?

16 MR. WRIGHT: Yes, that would satisfy our concerns,
17 your Honor thank you.

18 JUDGE SULLIVAN: Is the government aware of Mr. Lusk's
19 claim?

20 MS. LEVIN: Yes, your Honor. That's a separate issue
21 in terms of the substitute asset order that really doesn't go
22 to the heart of this. But in the petition for omission or
23 mitigation process, anybody -- if we were to go through with
24 that procedure, anybody that feels they have a claim to this
25 money is entitled to submit a petition. And DOJ follows, I

121avilc

1 have provided in the letter that I sent, a copy of the federal
2 regulations which governs who is entitled to, you know, assert
3 a claim to that money. So that would be covered. And of
4 course if the Court chooses the other option, which is to have
5 a receiver or special master appointed to do that, then the
6 Court can set, you know, a mechanism for anybody that had a
7 claim to the money to submit a claim.

8 JUDGE SULLIVAN: All right, thank you.

9 Can I ask you a question, if the Court of Appeals
10 ruled tomorrow in your favor, Ms. Levin, how long would it take
11 to get money paid out to the investors?

12 MS. LEVIN: Well, if the Court entered the final order
13 of forfeiture as to the substitute assets -- and, again, just
14 to be clear, it's only a final order of forfeiture for those
15 assets.

16 MR. FRIEDMAN: I get that. You're not going to pay
17 out anything until you hear from the Court of Appeals.

18 MS. LEVIN: We can't pay out anything--

19 JUDGE SULLIVAN: Right. Let's say I signed the order
20 today, you get the Court of Appeals ruling tomorrow, how long
21 could it take for anybody to get paid?

22 MS. LEVIN: We are going to start the process of
23 evaluating the petitions right way so that presumably the day
24 that the Court of Appeals decision comes out, that next day we
25 can start distributing the money. It would take a while to

121avilc

1 review the claims, usually takes about 6 months. Notice.
2 People submitting claims.

3 MR. FRIEDMAN: That six-month clock is not gonna start
4 ticking until the final order is signed, as far as you are
5 concerned.

6 MS. LEVIN: Yes. The final order of forfeiture can be
7 signed prior without any waiver from the defendants. The final
8 order of forfeiture can be signed now. What can't be done is
9 the distribution of money.

10 JUDGE SULLIVAN: I understand. I'm just asking for an
11 assessment of how time consuming it is to do what you have
12 proposed doing, with the marshal service and Department of
13 Justice.

14 MS. LEVIN: It is about, I would say, 6 months to a
15 year. We would obviously ask them to expedite it as quickly
16 as possible.

17 JUDGE SULLIVAN: That's if the Court of Appeals ruled
18 tomorrow.

19 MS. LEVIN: For the money, yes.

20 JUDGE SULLIVAN: Okay.

21 MS. LEVIN: No, your Honor, it's whatever period of
22 time it is. If the Court of Appeals rules -- yes, if the Court
23 of Appeals rules tomorrow, but while the Court of Appeals is
24 deciding the issues being briefed, we'll be working all this
25 time.

121avilc

1 JUDGE SULLIVAN: I see. And the receiver would be
2 faster or slower, in your view.

3 MS. LEVIN: The only difference in the receiver, two
4 reasons why we have not pursued this receiver option before
5 was, one, because of the expense associated with it. And that
6 was the main reason. The benefit to the receiver is that I
7 believe that if the Court appoints the receiver and the
8 claimants agree, that they can -- the receiver can distribute
9 the money immediately. But I'm not really clear. I mean I
10 guess it would be done through the SEC proceeding, whether or
11 not the defendants -- there is any issue with defendants
12 needing the defendants consent, I think the SEC could
13 probably --

14 JUDGE SULLIVAN: They could make claims, like anybody
15 else.

16 MR. JACOBSON: Usually when we have a receiver, we
17 have -- it's a situation where we go in, seize assets, get a
18 freeze, the receiver takes control. And then they propose a
19 plan. People can object. The defendant might be able to
20 object. But usually when we have a judgment in place, it sets
21 the amount of disgorgement. So we can take the assets, satisfy
22 the judgment, and then distribute the money. In this situation
23 where it would be consensual, I think, you know, assuming we
24 could have a receiver put in place, we would obviously need the
25 same type of consent from the defendants that they would

121avilc

1 relinquish any claim to the assets before they can become
2 subject to the Court's jurisdiction. And once it is clear that
3 the receiver has the jurisdiction over those assets, the
4 process can take a very short time, or a longer, depending on
5 the number of people who object and the nature of the
6 objections. So it could be very short. I don't know, I don't
7 think the claims process, 30 creditors, and maybe a few more,
8 that should not take more than a few months, I mean, normally.

9 JUDGE SWAIN: Well, you're proceeding is name the
10 corporate entities for the business entities in addition to the
11 defendants.

12 MR. JACOBSON: Correct.

13 JUDGE SWAIN: Does it name these -- the growth
14 technology fund and the RDA fund?

15 MR. JACOBSON: I think it names any potential
16 defendant that could have been -- that might have their name on
17 the account or any funds that might be available to investors
18 would be the names that are on the --

19 JUDGE SWAIN: If we were to go down this road and
20 focus on the, you know, for some number in the eight digits on
21 the accounts that have funds attributed to those funds in them,
22 and if the representation of Mr. Friedman that neither
23 Mr. Vilar nor Mr. Tanaka had any personal interest in those
24 particular funds, would it be feasible then to put in receiver
25 as to those funds which are not being managed, and make the

121avilc

1 process move faster than it would if we're looking at amounts
2 that are potentially titled to the individual defendants who
3 are active.

4 MR. JACOBSON: With respect to the -- my understanding
5 is that most of the funds are in the names of account for the
6 funds, and not the individuals. I think most of that's what
7 we're talking about. The private -- all of it, as far as the
8 government knows, all of the assets that actually have, or all
9 of the accounts that actually have assets in them, belong to
10 the funds and not the individual.

11 JUDGE SWAIN: And did you serve at the beginning of
12 this proceeding, these funds in some way -- I think where I'm
13 going is, is there a position that there is, you know, default
14 as to the claim of entitlement of the investors.

15 MR. JACOBSON: The complaint was served and the
16 amended complaint was served on defendants and the entities
17 through the defendants because they were the representatives of
18 all of the entities at the time. So everyone, as far as we
19 know, has been served properly with the complaint.

20 JUDGE SWAIN: And there was an appearance on behalf of
21 Amerindo, Mr. Licker was turning up for a while then ultimately
22 withdrew.

23 MR. JACOBSON: We know we have several defaults. I
24 don't know if we have an official default through the clerk's
25 office, have a certificate and moved for default, we have not

121lavilc

1 done that. But there have been a number of defaults with
2 respect to answering the complaint. So certainly one thing we
3 could do is just start the procedure whereby we would make a
4 move for default judgment or summary judgment, if necessary.
5 But that could take some time. Get judgments, which we would
6 contemplate doing in any event at some point in the case. And
7 once a judgment is entered, and money judgments are entered,
8 there would have to be some type of accommodation or agreement
9 with the government, because all the assets are still subject.

10 JUDGE SWAIN: Assets would need to be released into
11 something. I am trying to figure out whether there is a
12 structure that assets could be released into that would permit
13 the most expeditious approach that is consistent with Article
14 III powers to getting money to investors.

15 MR. JACOBSON: Subject to what the criminal authority
16 is going to -- what the government will do, I believe it is
17 possible, if the defendants consented, or as part of a final
18 judgment in our case, there were some other issues with respect
19 to a final judgment --

20 MS. SHEVITZ: I can't hear you, I'm sorry.

21 MR. JACOBSON: -- such as injunctions that we
22 typically seek --

23 If the defendants would consent as part of a final
24 judgment in our case to relinquish any of their objections of
25 the distribution of the money, and to allow the money to be

121avilc

1 subject to the district court to the civil action jurisdiction,
2 and appoint a receiver, that is something that could happen.
3 That is possible. That could be done in the case without us
4 litigating, if we could reach some type of civil order with the
5 defendants, and subject to the government's ability to
6 relinquish the restraints on the assets.

7 JUDGE SWAIN: Again, I think that it would be
8 expedient to think about and structure this mechanism in terms
9 of \$17 million or some sum south of that so that we don't have
10 to deal with the implications of the, right away with the
11 implications of the forfeiture proceedings and contentions as
12 to the whole universe of moneys. And if we can come up with a
13 mechanism that people are comfortable with for the 17 million,
14 maybe that ultimately turns into a mechanism for everything,
15 but it seems to me a much larger, more complicated, and
16 time-consuming job to say what can we do to take everything
17 that is in the substitute assets order out into some other
18 mechanism.

19 Let's see, so Ms. Shevitz was standing, and then
20 Mr. Friedman stood, and then perhaps Mr. Jacobson can respond
21 again once we have heard from them.

22 Ms. Shevitz.

23 MS. SHEVITZ: I would like to -- I'm reading from
24 Mr. Tanas personal letter sent to your Honor. He says that he
25 thinks Ross, David Ross, could bring the expert asset analysis

121lavilc

1 up to date for a cost of \$25,000. And probably could do it
2 quickly. That's what we have suggested. And it seemed to be
3 agreeable to the investors, as well, because then we'll know
4 what is in the pot.

5 I also suggest -- Mr. Tanaka said that he has not
6 received month-end statements of the principal Amerindo
7 accounts for over three years from the custodian broker, ever
8 since the changeover to JP Morgan Chase and it would be prudent
9 to request back missing copies, and for him to be able to get
10 copies, and everybody could help move this forward. The
11 problem is that we have been excluded from the
12 helping-moving-this-forward task, and we do want to move this
13 forward. All of this litigate here, and litigate here, we
14 don't want to do that either. We want to resolve this, but
15 we're not going to resolve it on the back of a forfeiture we
16 think is illegal.

17 JUDGE SWAIN: And that's why --

18 DEFENDANT TANAKA: May I be heard?

19 JUDGE SWAIN: Mr. Tanaka?

20 DEFENDANT TANAKA: First of all, can I have a copy of
21 the transcript again?

22 JUDGE SWAIN: Yes, we'll arrange that.

23 DEFENDANT TANAKA: Yes, thank you.

24 And then to what Ms. Shevitz said, if David Ross has
25 done additional work and given it to Mr. Friedman, can Mr.

121avilc

1 Friedman submit that to court to see if we have up to date
2 numbers, what have you?

3 MR. FRIEDMAN: I can, but I should say that all
4 Mr. Ross did was confirm to me the valuations as of
5 September 30, 2009, which were in the letters he sent to Judge
6 Sullivan. The comment that the assets are now worth 50 million
7 is a comment Mr. Ross has made, but I don't have any supporting
8 documentation, because I have not talked to him in detail about
9 it.

10 So my narrow answer to Mr. Tanaka's question is I
11 don't know the basis on which Mr. Ross made that statement and
12 whether there are any supporting work papers.

13 DEFENDANT TANAKA: So they're going to have to be used
14 as a basis for further work for him, then, as long as he is
15 half way there anyway.

16 MR. FRIEDMAN: I think that's correct.

17 MS. SHEVITZ: And, further, my suggestion would be
18 then to ask these people who have been working on the case for
19 6 years to get the final list together of people who they think
20 are the investors, and let's do that process while we're doing
21 all of the rest.

22 In the appeal, the brief is due in two months, in
23 March. Theoretically, the case could be on the calendar for
24 argument 6 to 12 weeks after, that's the current schedule.
25 This is not going to be forever. In the interim, we are still

121avilc

1 willing to do hardship things, if there is hardships. But why
2 can't we just move this forward without all of these vehicles
3 getting in the way of turf wars and CFR provisions and things
4 like that.

5 JUDGE SWAIN: What is the "this" that you are
6 proposing to move forward.

7 JUDGE SULLIVAN: Yes.

8 MS. SHEVITZ: We can agree to a lot of things if we
9 know the pot, and the investors, and the claimants. We don't
10 know them. We don't know them. The government says they know
11 now, 20 or 30 people, or what the claims are. Why can't we
12 just -- why can't -- with all due respect, your Honor, order
13 those to be produced now so we can see who it is and we can see
14 what we're talking about. Then we could agree to more. If we
15 know that we're not going to be liable at the end for claims,
16 then we can agree to a lot of different things. But we just
17 don't know what the facts are now.

18 JUDGE SWAIN: Well, at least an hour and a half ago,
19 Ms. Levin agreed that you would be given the government's and
20 SEC's list of known investors claims.

21 MS. SHEVITZ: Okay.

22 JUDGE SWAIN: That's been taken care of for a while.

23 MS. SHEVITZ: Okay, we have not gotten that yet,
24 though.

25 JUDGE SWAIN: Because she is still in the courtroom.

121avilc

1 And so are all of us, and it's almost 7:00.

2 MS. SHEVITZ: I know, I know, I -- I know. But that's
3 my suggestion of moving it forward with Mr. Ross.

4 JUDGE SWAIN: Are you saying that evaluation by Mr.
5 Ross of the illiquid assets is a condition to Mr. Vilar's
6 willingness to consent not to make a claim back against the
7 government as to an interim distribution.

8 MS. SHEVITZ: It depends how much the interim
9 distribution is.

10 JUDGE SWAIN: We have been talking about \$17 million
11 as an interim distribution, covering all investors and
12 something around \$2 million at this point as a hardship
13 distribution, which would be a subset of the 17 million.

14 MS. SHEVITZ: Subset of it. Again, I have to talk to
15 Mr. Vilar about this. A couple of issues come up. Will we
16 need to reduce the forfeiture amount by whatever we agreed to
17 distribute now, for one.

18 JUDGE SWAIN: I think that would -- well, the
19 forfeiture amount or the substitute assets order?

20 MS. SHEVITZ: Well, the substitute assets go to the
21 forfeiture amount. So that would be one of our conditions,
22 that any payments that are made now reduce the forfeiture
23 amount.

24 JUDGE SWAIN: Ms. Levin.

25 MS. LEVIN: The forfeiture amount -- the substitute

121avilc

1 assets, the value of the substitute assets is applied against
2 the money judgment that has been entered against the defendant,
3 so that would reduce it. If it's not going to be a forfeiture,
4 if we're doing this outside of the forfeiture process, that it
5 doesn't necessarily reduce the forfeiture amount. It would --

6 JUDGE SWAIN: Would you agree to credit this against
7 the forfeiture amount, let me put it that way. Obviously, it
8 wouldn't happen --

9 MS. LEVIN: I would agree to credit this against the
10 forfeiture amount.

11 But the other caveat, with respect to retaining an
12 expert to value the private placements and private stock. We
13 do not have authority to pay for that. The question is who is
14 going to pay for it. If the assets are not being forfeited,
15 then the marshal service who typically pays for those things
16 out of the forfeited funds, they don't have authority to do so.
17 So it's being done through a special masters process. I don't
18 want to belabor the mechanics of it, but I want to make clear
19 the government can't fund these expenses, so that would have to
20 be through a special master or a receiver.

21 MR. NAFTALIS: The only thing I would add to that,
22 your Honor, it may be premature to value the assets, because
23 what we are talking about here is an interim distribution less
24 than the amount of cash in the accounts, so we could value the
25 assets now, but we're going to have to do it again later when

121avilc

1 they are liquidated. And the accounts, right now, it's 20 plus
2 million. And we are talking about 17 million. So we
3 could fund this distribution with just cash, the privates will
4 always be there and they can be valued when they are actually
5 liquidated. So we can do it much more easily than involves
6 lots and lots of --

7 DEFENDANT TANAKA: Judge Swain --

8 JUDGE SWAIN: I need you to go back about 50 words,
9 slow it down, and be as clear as you can, because we're not
10 hearing you.

11 DEFENDANT TANAKA: Thank you.

12 I find that there are a lot of e-mails and documents,
13 judging by the government e-mail, its letter recently,
14 suggesting more of the process of all of these e-mails, and
15 bits, and memos that are going back and forth.

16 JUDGE SWAIN: So you're saying that in connection with
17 this proceeding, you have seen that there have been a lot of
18 e-mails and other --

19 DEFENDANT TANAKA: Yes, and --

20 JUDGE SWAIN: Mr. Tanaka -- Mr. Tanaka, hold on. Only
21 one of us can speak at a time. I'm trying to restate my
22 understanding of what you said, so that we can have an accurate
23 record, so listen to me for just one second and we'll go stage
24 by stage.

25 I believe I heard you saying, because the court

121avilc

1 reporter didn't get this down exactly, that you have seen that
2 there are a lot of communications by e-mail and otherwise that
3 have not been copied to you, so that you have not fully been in
4 the loop. Would that be fair?

5 DEFENDANT TANAKA: Judging by the letter, I have seen
6 today from the government --

7 JUDGE SWAIN: And you're asking, then, that you be
8 copied on the communications between the government and
9 Mr. Vilar's counsel, and counsel for the claimant?

10 DEFENDANT TANAKA: Here's the question. If I'm
11 representing myself, pro se, Judge Swain, should I be a direct
12 recipient of these communications?

13 JUDGE SULLIVAN: Well, I think what happened last
14 night is the government submitted, electronically, a letter
15 with attachments that includes some of the things we talked
16 about today. It was clear that you were not gonna see those in
17 time, so I don't think you saw that letter, right?

18 DEFENDANT TANAKA: No, I didn't see that. But they
19 referred to plenty of memos and communications during the
20 summertime.

21 JUDGE SULLIVAN: Well, I think --

22 DEFENDANT TANAKA: That I was not privy to that, that
23 I'm completely in the dark about.

24 JUDGE SULLIVAN: The e-mails that were referenced were
25 attachments to a letter from yesterday. And you'll get that

121lavilc

1 letter by hard copy. It was unfortunate you couldn't get it
2 before today, but we'll send that to you. It's probably been
3 mailed to you already.

4 I'm not sure, if there are other things that -- that
5 you think everyone referenced that you have not received, I
6 think maybe once you look at the transcript, it might be more
7 apparent as to what was being referred to.

8 JUDGE SWAIN: Well, let me say, things that are filed
9 with the Court in the SEC action in which Mr. Tanaka is
10 officially appearing pro se, absolutely have to be served on
11 Mr. Tanaka, and served in the most rapid fashion. Given the
12 questions that are in the air about proposals for more, you
13 know, informal consensual arrangements and questions about
14 verification of the universe of investors, and questions about
15 how one goes about getting a handle on the universe of assets,
16 it seems to me expedient that the assumption be that Mr. Tanaka
17 be copied on correspondence among the parents in interest here
18 so that we can move things along in the most efficient way.
19 And I see nods from both the front and the back tables of
20 lawyers here in the courtroom so, Mr. Tanaka, I think you'll
21 probably be getting a little bit more mail. And Miss Eiger is
22 here, as well, and she obviously has some things she needs to
23 talk to you about, directly.

24 DEFENDANT TANAKA: Thank you. I'm going to buzz off
25 now, if that's okay with you.

121avilc

1 JUDGE SWAIN: All right. Thank you, Mr. Tanaka.

2 DEFENDANT TANAKA: Thank you very much.

3 (Mr. Tanaka no longer present)

4 JUDGE SWAIN: Mr. Friedman.

5 MR. FRIEDMAN: Yes, I will be very brief.

6 My only concern is I took it from the colloquy between
7 Mr. Jacobson and your Honor, and then between Ms. Shevitz and
8 your Honor, that we are still dealing with the issue of do the
9 defendants, or will the defendants consent to some
10 distributions. And I just want to reiterate as clearly as I
11 can, they have admitted -- it is not me talking, it is the
12 defendants' admission that these were custodial funds. They
13 don't have any right to consent, or withdraw, or withhold
14 consent and, therefore, I think that to let them withhold that
15 consent or condition that consent and stop the distribution
16 process is giving them a veto power over something over which
17 they should not have a veto power.

18 JUDGE SULLIVAN: Ms. Levin is not cutting any checks
19 until she has got an appellate judgment in her favor.

20 MR. FRIEDMAN: True, Judge, but I suggest that if your
21 Honors decide to go the receiver, or what I would argue
22 magistrate judge, but clearly that is not gonna fly. If you
23 would go the receiver route, it may be that checks will be cut
24 prior to the decision on the appeal.

25 JUDGE SWAIN: Let me say this before Mr. Jacobson

121avilc

1 speaks.

2 I think the issue here, and it is both a procedural
3 issue and a substantive issue, is jurisdiction to deal with
4 these assets. Right now, there is jurisdiction by virtue of
5 the substitute assets order in the criminal case, that I know
6 people have issues with, but it's there, it's entered, those
7 have been declared substitute assets that are potentially
8 subject to forfeiture in the criminal case.

9 Mr. Jacobson's point is that in the civil case which
10 is an in personam, not an in rem proceeding, at least at this
11 stage, the Court has to have some authority for dealing with
12 assets and distributing assets that's procedurally consistent
13 with the type of case. And short of going through a
14 determination that results in a judgment that provides that,
15 for legal reasons that are good and sufficient and consistent
16 with due process, the Court can force a particular mode of
17 distribution of a particular pool of assets as a practical
18 matter and to get this done quickly, there needs to be
19 something that the appropriate interested parties can agree to
20 and sign off on as an expedient measure. And that's where we
21 are. Because I can't give advisory opinions, I don't you know
22 get to grab assets out of the air.

23 So what I would like to propose is this, that we
24 talked about and set January 18th as the deadline for
25 Messrs. Vilar and Tanaka to respond specifically to the

121avilc

1 carveout for hardship request that, at this point, is the
2 request on behalf of the Mayers for 1.8, and Mr. Heitkoenig's
3 cousin for 50,000. And the counsel for Ms. Sayko wanted an
4 opportunity to identify a short-term hardship request on her
5 behalf. Mr. Hall, you can submit and copy a letter that really
6 has to be a letter that, in your capacity as an officer of the
7 court, represents what Ms. Sayko would say would be necessary
8 to keep her from being, you know, put out of her apartment and
9 reduced to eating things that people shouldn't have to eat.

10 MR. HALL: I understand.

11 JUDGE SWAIN: Over the next 6 months. Whatever that
12 number is. Communicate that by letter by, today's Tuesday, end
13 of business Thursday of this week?

14 JUDGE SULLIVAN: Yes.

15 JUDGE SWAIN: And defense counsel to respond to the
16 Court and counsel by next Wednesday as to the individual
17 defendants' position on allowing that amount of funding, or
18 some subset thereof, to be distributed very quickly to the
19 hardship cases.

20 And it seems to me that the mechanism for distributing
21 that would need to be the government agreeing to release that
22 carveout. It would have to be a stipulation that has the
23 government releasing that carveout from the substitute assets
24 order, and the defendant's agreeing that they will not make a
25 claim at the end of the day against the government for that

121avilc

1 amount as improperly distributed, period.

2 And, then, as to the structure for an approach to the
3 remainder of the 17 million, what I propose is that Judge
4 Sullivan and I consider everything that has been said today and
5 within the next, you know, 24 to 72 hours, we'd aim by the end
6 of the week to issue an order that would outline a structure
7 and provide an opportunity for parties in interest to respond
8 to, or object to, that structure and try to move on from there.
9 Because I think there have been enough different concepts
10 floating around this room that asking you all to talk and
11 propose something to the Court would not really be productive.

12 Judge Sullivan, would you be willing to --

13 JUDGE SULLIVAN: Yeah, I think that makes the most
14 sense.

15 MR. FRIEDMAN: How if at all would the order that you
16 contemplate issuing deal with amounts above 17 million; in
17 other words, the remainder of the liquid assets and the public
18 securities.

19 JUDGE SWAIN: Frankly, my conception is not to deal
20 directly with that, if at all, in this order. It is possible
21 that we may think that some approach to valuation or putting
22 out the concept of the feasibility of an in-kind distribution
23 of the private securities, you know, interests in the private
24 securities. Maybe want to ask you that question in connection
25 with this order. But I think what we would want to work on

121avilc

1 would be a mechanism for distribution of liquid assets in a
2 claim process that would be appropriate to those liquid assets.

3 MR. FRIEDMAN: Quickly, I would suggest to your Honor
4 that the liquid assets are not limited to 17 million.
5 Remember, the 17 million, it was a compromise proposal.

6 JUDGE SWAIN: Yes.

7 MR. FRIEDMAN: The liquid asset number, I think, is
8 significantly higher than the 17 million.

9 JUDGE SWAIN: I understand that. And that's one
10 reason I'm trying to focus on the most significant, least
11 controversial amount of money.

12 MR. FRIEDMAN: I will be quiet.

13 JUDGE SWAIN: Mr. Begos has been standing for a while.

14 MR. BEGOS: Two quick points. Could I ask that the
15 responses by defense counsel be also served on all of the
16 nonparties like the prior letters have in the last couple of
17 weeks.

18 JUDGE SWAIN: That's why I said copy to the court,
19 counsel, and all parties in interest.

20 MR. BEGOS: Okay, very well.

21 And the other point I just wanted to make, I did
22 mention before I started talking about the mayor's needs when
23 the discussion was as to the Court's authority to enter some
24 sort of order, this is sort of a counter point to Mr.
25 Friedman's position that the defendants don't have an interest

121avilc

1 in the money that is in the accounts.

2 To the extent that the defendants do claim some
3 interest and do claim that they need to be consulted or approve
4 distributions, 18 U.S.C. 36130 A(a)(1) gives Judge Sullivan the
5 authority upon a finding that the defendant is in default on a
6 payment of a fine or restitution, the Court may take any action
7 necessary to obtain compliance with the order or fine or
8 restitution.

9 Obviously, Judge Sullivan, you are the only one who
10 can determine whether there is a default in the order of
11 restitution. It was not a payment over time, it was a payment
12 immediately. And to the extent your Honor is convinced that
13 there is a default, then my reading of this section is that
14 your Honor has fairly broad discretion to fashion any kind of
15 relief that would be appropriate to have the restitution paid.
16 And that deals with the five criminal victims and not everybody
17 else. But I do believe that is one other piece of ammunition
18 that -- or power that the Court has here that may prove
19 relevant.

20 JUDGE SWAIN: We'll take that under advisement.

21 MR. BEGOS: Thank you.

22 JUDGE SWAIN: Ms. Shevitz.

23 MS. SHEVITZ: Two things.

24 Mr. Lusk has said this, and I think I need to say,
25 that the private securities must be managed. It is criminal to

121avilc

1 not manage them now. I don't understand all of it, what goes
2 on. But, apparently, there could be Facebook stock that needs
3 to be claimed, or should have been claimed in some of these
4 private securities that are sitting in a drawer that nobody has
5 looked at and nobody has managed. And if nobody starts
6 managing them now, it's going to be worse. It's going to --
7 perhaps he could say something.

8 JUDGE SULLIVAN: I think the point's been made. I
9 think that's understood.

10 MR. LUSK: I'll be happy to write the Court.

11 MS. SHEVITZ: Because I don't totally understand how
12 this works.

13 JUDGE SWAIN: We understand it conceptually, if not --

14 MS. SHEVITZ: The last thing I want to say is I did
15 move for stay of forfeiture. And to the extent that the Court
16 is considering moving forward with that, I need an order so
17 that I can exercise my appellate right, because that is
18 immediately appealable.

19 JUDGE SULLIVAN: I'm not sure I --

20 JUDGE SWAIN: We are talking about a structure for
21 carving money out of the forfeiture process.

22 MS. SHEVITZ: Yes.

23 And to that extent, if this forfeiture just sits
24 there, I'll be glad to wait, too, but to the extent anybody
25 enters an order of forfeiture or does anything else under a

121avilc

1 forfeiture mantel, I need to have my appellate rights, by
2 having your Honor --

3 JUDGE SULLIVAN: No, obviously, we're not there yet.
4 The request is to hear from your client with respect to the
5 hardship money which would be on consent, and then we'll issue
6 an order later this week that directs the parties to do some
7 follow up with respect to interim distributions that will be
8 faster than waiting for the appeals process to exhaust itself.

9 MS. SHEVITZ: Okay. And my point is that, as long as
10 it is not within the forfeiture, I don't have a problem. If it
11 is -- or if we don't get a credit to the forfeiture. We need
12 the credit to the forfeiture. But if there is any ordered
13 concerning the forfeiture aspect of this, within forfeiture, I
14 have moved for a stay, and that motion is pending.

15 JUDGE SWAIN: We hear you.

16 MS. SHEVITZ: Thank you.

17 JUDGE SWAIN: And Judge Sullivan hears you.

18 MS. SHEVITZ: Yes.

19 JUDGE SWAIN: Which is the important thing.

20 MS. EIGER: I have a single brief point, just because
21 that \$17 million has come up again and I don't want that single
22 point I have made today to be lost, that a fair distribution of
23 anything depends upon ascertaining what the total pot is and
24 what the total claims are. Because you cannot -- because
25 fairness requires that and, otherwise, we may be favoring some

121avilc

1 of the claimants over others.

2 MR. FRIEDMAN: I said I would shut up, but Mr. Marcus
3 just handed me a note back on the hardship issue.

4 Mr. Marcus informs me that there are two members of
5 his family, both of whom are ATGF investors, that do have
6 family financial needs. And I would ask for the same
7 opportunity -- I'm not in a position now to articulate the
8 reasons with any detail, because I have just gotten this
9 note -- but I ask for the same deadline that you gave Mr. Hall,
10 just to put in a letter that describes what is in the note that
11 Mr. Marcus just gave me.

12 JUDGE SWAIN: Close of business Thursday?

13 MR. FRIEDMAN: Thank you.

14 JUDGE SWAIN: All right. Did the government or the
15 SEC just send Mr. Tanaka a copy of the transcript last time?
16 I'm hoping the answer to that will be yes.

17 MR. SALZBERG: Yes.

18 MS. SHEVITZ: We are CJA, I would like a copy.

19 JUDGE SWAIN: Do the form and Judge Sullivan will sign
20 off on that.

21 All right, thank you all very much. I think we have
22 made a great deal of progress at least in communicating with
23 each other today. And Judge Sullivan and I will come out with
24 this order, and I hope that we will make progress on the
25 distributions quickly, as well. Good evening. Keep well,

121avilc

1 everyone.

2 THE DEPUTY CLERK: All rise.

3 (Adjourned)